(11)

No. 89-322-CSX
Status: GRANTED

Title: United Steelworkers of America, AFL-CIO-CLC, Petitioner
v.
Tharon Rawson, etc., et al.

Docketed:
August 24, 1989

Court: Supreme Court of Idaho

Counsel for petitioner: Cohen,George H.

Counsel for respondent: Howard Jr.,Kenneth B.

Entry	Date	Note	Proceedings and Orders
1	Jul 6 1989	G	Application (A89-5) to extend the time to file a petition for a writ of certiorari from July 18, 1989 to Septemb 2, 1989, submitted to Justice O'Connor.
2	Jul 12 1989		Application (A89-5) granted by Justice O'Connor extending the time to file until August 17, 1989.
3	Aug 4 1989	G	Application (A89-5) to extend further the time to file petition for a writ of certiorari from August 17, 1989 to August 24, 1989, submitted to Justice O'Connor.
4	Aug 9 1989		Application (A89-5) granted by Justice O'Connor extending the time to file until August 24, 1989.
5	Aug 24 1989	G	Petition for writ of certiorari filed.
6	Aug 24 1989		Appendix of petitioner filed.
8	Sep 26 1989	X	Brief of respondents Tharon Rawson, et al. in opposition filed.
7	Sep 27 1989		DISTRIBUTED. October 13, 1989
9	Oct 4 1989	X	Reply brief of petitioner United Steelworkers, etc. filed.
12	Oct 16 1989		REDISTRIBUTED. October 27, 1989
13	Dec 4 1989		REDISTRIBUTED. December 8, 1989.
16	Dec 19 1989		REDISTRIBUTED. January 5, 1990
17	Jan 8 1990		Petition GRANTED. and the parties are directed to adhe to the following briefing schedule. The brief of the petitioner must be received by the Clerk on or before February 9, 1990. The brief of the respondent must be received by the Clerk on or before March 6, 1990, and a reply brief, if any, must be received by the Clerk on c before March 16, 1990.
			**********
18	Jan 26 1990		SET FOR ARGUMENT MONDAY, MARCH 26, 1990. (2ND CASE)
19	Feb 9 1990		Brief amicus curiae of Public Citizen filed.
20	Feb 9 1990		Brief amicus curiae of Continental Beverage Packaging, Inc. filed.
21	Feb 9 1990		Joint appendix filed.
22	Feb 9 1990		Brief of petitioner United Steelworkers, etc. filed.
23	Feb 20 1990		Record filed.
		*	Certified copy of original record, box, received.
24	Mar 2 1990		CIRCULATED.
25	Mar 5 1990	X	Brief of respondents Tharon Rawson, et al. filed.
26	Mar 16 1990	X	Reply brief of petitioner United Steelworkers, etc. filed.
27	Mar 26 1990		ARGUED.

89-322 (1)

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

THARON RAWSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR SETH RAWSON AND CINDY RAWSON; BERNIECE JOHNSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON AND JOHN RUSSEL JOHNSON; LAURA DUNBAR, AS GUARDIAN AD LITEM FOR RICKINA ROSSITER AND GLEN ROSSITER, JR.; AND MARY WOOD, AS GUARDIAN AD LITEM FOR LESLIE D. WOOD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

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QUESTIONS PRESENTED

1. Does the federal duty of fair representation preempt a cause of action for personal injury under state tort law based upon a union's alleged negligence in administering and enforcing the safety provisions of a collective bargaining agreement?

2. Did the Idaho Supreme Court, upon reconsideration of this case in light of *IBEW v. Hechler*, 481 U.S. 851 (1987), render a decision on federal preemption under Section 301 of the Labor Management Relations Act that is contrary to this Court's decision in *Hechler*?

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UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
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THARON RAWSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR SETH RAWSON AND CINDY RAWSON; BERNIECE JOHNSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON AND JOHN RUSSEL JOHNSON; LAURA DUNBAR, AS GUARDIAN AD LITEM FOR RICKINA ROSSITER AND GLEN ROSSITER, JR.; AND MARY WOOD, AS GUARDIAN AD LITEM FOR LESLIE D. WOOD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

The United Steelworkers of America, AFL-CIO-CLC, hereby petitions for a writ of certiorari to enable this Court to review the judgment of the Supreme Court of Idaho in *Rawson, et al. v. United Steelworkers of America*, Case No. 15338.

OPINIONS BELOW

The opinion of the Idaho Supreme Court is reported at 115 Idaho 785, 770 P.2d 794, and is reproduced as Appendix A (1a-13a). That opinion was issued following an

order by this Court that granted a petition for certiorari in No. 86-908, vacated a prior judgment and remanded for further consideration in light of *IBEW v. Hechler*, 481 U.S. 851 (1987). See 482 U.S. 901 (1987).

The opinion of the Idaho Supreme Court that was vacated upon that petition for certiorari is reported at 111 Idaho 630, 726 P.2d 742. It is reproduced as Appendix B (13a-48a). An earlier unreported opinion, which was issued on February 24, 1986, and later withdrawn by the Idaho Supreme Court upon rehearing, is reproduced as Appendix C (49a-88a). The trial court opinion that was under review—the November 1, 1983, opinion of the District Court of the First Judicial District of the State of Idaho—is unreported. It is reproduced as Appendix D (89a-106a).

The Appendix also contains two decisions that were rendered at an earlier stage of proceedings in this case. The Idaho Supreme Court's opinion of September 13, 1979, is reported at 100 Idaho 523, 620 P.2d 21, and is reproduced as Appendix E (107a-160a). The Idaho trial court's opinion of January 29, 1976, is unreported; it is reproduced as Appendix F (161a-164a).

JURISDICTION

The opinion and judgment of the Supreme Court of Idaho were issued on December 22, 1988. A timely petition for rehearing was denied on April 19, 1989 (Appendix G, 165a-166a). On July 12, 1989, Justice Sandra Day O'Connor entered an order extending the time for filing a petition for certiorari to August 17, 1989 (Appendix H, 167a), and on August 9, 1989, Justice O'Connor entered an order further extending the time for filing a petition for certiorari to August 24, 1989 (Appendix I, 168a).

The federal questions presented in this petition were properly raised and were decided by both the trial court

and the Idaho Supreme Court (3a-8a, 30a-36a, 101a-106a). This Court has jurisdiction to review the judgment below by certiorari pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 9(a) of the National Labor Relations Act of 1935, as amended, 29 U.S.C. § 159(a), provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The Sunshine Mining Company operates a silver mine in Kellogg, Idaho, known as the Sunshine Mine. The United Steelworkers of America ("the union") is the exclusive bargaining representative of miners working in the Sunshine Mine.

The collective bargaining agreement between the company and the union defines a limited role for the union in relation to the safety of employees, in Article IX, entitled

"Safety and Health." That article, as it stood at the time relevant to this case, is reproduced in full as Appendix J to this petition (169a-171a). The article began by acknowledging the employer's responsibility for the safety and health of its employees: "The Company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment" (169a). The article provided for a safety committee composed of six members, three designated by the employer and three designated by the union. It defined the function of the safety committee as "to advise with the Plant Manager concerning safety and health matters" (170a). The article permitted the union to designate a representative to "accompany" the company's safety engineer once each month on "a tour of a section of the mine," with the results of the tour to be considered at the next meeting of the safety committee (171a). A union member of the committee was also permitted to "accompany" the State Mine Inspector on any State inspection made at the property (*id.*). The agreement made clear that the safety committee had no authority to change safety practices in the mine; it could only submit "advices," "suggestions [and] recommendations" to the plant manager "for his consideration and for such action as he may consider consistent with the Company's responsibility to provide for the safety and health of its employees . . . ." (170a-171a) The union did not even have recourse to the grievance procedure unless a majority of the "entire" safety committee (necessarily including at least one management member) had concurred in a recommendation which "need[ed] action immediately" but was not carried out (171a). Apart from this article, the agreement contained no other provisions regarding safety and health.

On May 2, 1972, a major fire occurred underground in the Sunshine Mine. Ninety-one miners died from asphyxiation or carbon monoxide poisoning. After a thorough investigation, the United States Bureau of Mines concluded that the most likely cause of the fire was spontaneous

combustion of timbers and debris in an area that had long before been worked out and walled off from the rest of the mine.

The families of the deceased miners collected workmen's compensation payments from the company under Idaho law. A number of the families then filed suit seeking additional damages from various third parties, including the United States Bureau of Mines and the manufacturers of certain materials and equipment that had been used in the mine. *See House v. Mine Safety Appliances Co.*, 573 F.2d 609 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978). Four of the families sued the union in the state courts of Idaho, thus initiating the lawsuit that is the subject of this petition.[1]

The sole basis for respondents' claims against the union was alleged negligence in administering and enforcing the Safety and Health article of the collective bargaining agreement. Specifically, the complaint alleged that the union

> undertook to act as accident prevention representative and enforcer of the Company-Union agreement and did it negligently, to wit:
>
> A. It misrepresented its safety concern and expertise to the rank and file.[2]

---

[1] The four respondents, all widows of deceased miners or guardians of minor children of the deceased miners, sued variously in their individual capacities and on behalf of the children. The capacity in which each respondent brings the suit is identified in the caption of this petition.

These families also sued the State of Idaho in this case, alleging that the state's mine inspectors had negligently failed to identify the hazards. Those claims were dismissed in earlier proceedings in this case (117a-154a).

[2] The Idaho courts dismissed on state-law grounds the misrepresentation part of this claim, along with a similar fraud claim based on allegations that the union had falsely represented that it possessed expertise on safety matters and had thus lulled the miners into reliance on its safety "inspections." (8a-9a, 16a-18a).

B. It failed to develop adequate safety programs for its union membership.

C. It undertook to provide representatives who inspected and pretended to enforce the contractual accident prevention clauses, and did so negligently, to wit:

(1) It failed to require mine evacuation on first evidence of smoke underground;

(2) It failed to require fire drills;

(3) It failed to require personal protective equipment;

(4) It failed to require adequate protection against spontaneous combustion of discarded timbers underground;

(5) It failed to require adequate emergency egress from the mine.

At an early stage of the proceedings, the union moved for dismissal or summary judgment on federal preemption grounds. In 1976 the Idaho trial court granted the motion for summary judgment (164a). The court ruled that respondents' claims were based entirely on the manner in which the union had carried out its function of representing its members, that the federal duty of fair representation exclusively defined the terms on which a union could be held liable in that capacity, and that negligence was not a permissible ground for such liability (163a-164a). Accordingly, the trial court dismissed the complaint (164a).

On appeal, the Supreme Court of Idaho reversed (108a).[3] A "special concurrence" (joined by three members of the five-member court) stated that "the precise

[3] The Idaho Supreme Court's opinion is reproduced in full as Appendix E. Most of that lengthy opinion is devoted to respondents' claims against the State of Idaho. The portion of the majority opinion that addresses the claims against the union and a special concurring opinion on union liability appear at 109a-116a, 155a-156a.

nature of the legal issues raised by the appellants' wrongful death action is not entirely clear at the present procedural posture of the case," and "a final decision whether the wrongful death action against the respondent union is preempted by federal labor laws must therefore await a full factual development of the legal issues raised under our state tort law" (156a). The union's petition for certiorari was denied. *United Steelworkers of America v. Dunbar*, 446 U.S. 983 (1980).

On remand, after completion of extensive discovery in the trial court, the union again moved for summary judgment, arguing that on the undisputed facts the union could not be held liable under either federal labor law or Idaho tort law. In 1983 the trial court again granted the union's motion, primarily on grounds of Idaho tort law (97a-100a). In the alternative, on the issue of federal preemption, the trial court ruled that the summary judgment record made it clear that respondents' negligence claims against the union were based solely on the union's "representational duties" and "the manner in which the Union carried out the collective bargaining agreement" (103a-104a). The trial court therefore "respectfully request[ed] the [Idaho] Supreme Court to re-examine its holding that this case is not pre-empted by federal labor law" (106a).

On appeal the Idaho Supreme Court reinstated respondents' negligence claims (15a-16a).[4] In addressing the Idaho tort law issues, the court *assumed* that the safety and health article meant that the union "had contracted to inspect . . . the mine" (29a). The court accordingly characterized the union's exercise of its contractual right to "accompany" the employer's safety engineer or the

[4] The Idaho Supreme Court initially affirmed the trial court's judgment of dismissal on principles of Idaho tort law, without reaching the issue of federal preemption (49a-55a). Respondents then petitioned for rehearing, and the Idaho Supreme Court rendered the decision described in text.

state inspector as "*in fact*, inspect[ing] the mine" (*id.*; emphasis in original). And, on these premises, the Idaho Supreme Court concluded that under Idaho law the asserted failures of the union to discover dangerous conditions or to request that the employer improve those conditions could, if proved negligent, constitute an actionable tort.

The Idaho Supreme Court then held that respondents' tort claims were not preempted by federal labor law. The court first rejected the union's argument that the federal duty of fair representation exclusively defines the grounds upon which a union can be held liable for the manner in which it carries out the function of representing its members (30a-31a). Second, although the court acknowledged that "the nature and scope of the Union's duty" were defined by the safety provisions of the collective bargaining agreement (33a), the court nonetheless concluded that "the provisions of the collective bargaining agreement do not require interpretation" and thus distinguished this Court's decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) (33a).

In concluding that federal law does not preempt respondents' claims, the Idaho Supreme Court relied heavily on the Eleventh Circuit's decision in *Hechler v. IBEW*, 772 F.2d 788 (11th Cir. 1985)—a decision which this Court later reversed in *IBEW v. Hechler*, 481 U.S. 851 (1987). The Idaho Supreme Court quoted extensively from the Eleventh Circuit's opinion in *Hechler*, stated that the *Hechler* court "correctly analyzed the nonapplicability of the preemption doctrine to cases of this nature" (34a), and concluded: "We agree with the *Hechler* analysis" (36a).

The union petitioned for certiorari while *Hechler* was pending in this Court. After reversing the Eleventh Circuit's ruling in *Hechler*, this Court granted the petition, vacated the Idaho Supreme Court's judgment, and remanded "for further consideration in light of" *Hechler*. 482 U.S. 901 (1987).

On remand, the Idaho Supreme Court "adhere[d] to [its prior] opinion as written" (8a). However, the court no longer acknowledged, as it had prior to *Hechler*, that "the nature and scope of the Union's duty" were defined by the collective bargaining agreement (33a). Instead, it concluded that "the standard of care is imposed by state law without reference to the collective bargaining agreement" (4a). The court ignored the union's consistent argument that it was not authorized to "inspect" the mine under the Safety and Health article and had not done so, and that the exact scope of its activities and duties under that article could only be determined through an interpretation of the collective bargaining agreement. Instead, the court repeatedly stated that the union had "conceded [that it] undertook to inspect" the mine and that "the issue is solely whether that inspection was negligently performed under traditional Idaho tort law." (5a; see also 41, 61-81).

Two justices dissented. Justice Bakes wrote that the duty of fair representation was "the only duty which the union owed to its members" in "pursuing the members' rights under the collective bargaining agreement to correct unsafe working conditions in the mine" (11a). He also took strong issue with the majority's conclusory statement that the union had "conceded" that it undertook to inspect the mine:

> The union has never conceded that it undertook to inspect the Sunshine Mine. The Court's opinion does not point to any pleading or any evidence in the record to sustain either its factual conclusion that the union undertook to inspect the mine, or its statement that the union has "conceded" that it undertook to inspect. There is absolutely nothing to support either of those two statements.

(10a).

The other dissenting justice wrote that *Hechler* "requires us to hold that there is pre-emption." (11a).

> Except for any duty imposed by the collective bargaining agreement, the Union had no duty for the safety of its members. The existence of this duty and its nature and scope are dependent on the meaning of the collective bargaining agreement. In *Rawson I* this Court said that "the provisions of the collective bargaining agreement . . . determined . . . the nature and scope of the Union's duty." [111 Idaho] at 640, 726 P.2d at 752. I agree and for this reason would hold that *Hechler* applied.
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> • • •
>
> Here, I am unable to see how a court could ascertain the duty of the Union without determining the meaning of the collective bargaining agreement. This would require the interpretation or construction of the collective bargaining agreement.

(12a).[5]

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[5] Although the judgment of the Idaho Supreme Court contemplates further proceedings in the trial court, it is final within the meaning of 28 U.S.C. § 1257(a) because "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975). *See also id.* at 485-86; *Hudson Distributors, Inc. v. Lilly*, 377 U.S. 386, 389 n.4 (1964). In this case plaintiffs have pleaded only a personal-injury claim based on allegations of negligence under Idaho law; they have steadfastly denied that their claim is based on the federal duty of fair representation and their complaint does not plead any of the elements of a breach of that duty as defined by this Court. *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

REASONS FOR GRANTING THE WRIT

This case presents two issues, each of which independently merits the attention of this Court on certiorari. The first issue is whether the federal duty of fair representation preempts a state tort claim based on alleged union negligence in administering the safety provisions of a collective bargaining agreement. The second issue is whether the Idaho Supreme Court's decision, following remand for further consideration in light of *Hechler*, is inconsistent with the principles of that decision.

On each issue the Idaho Supreme Court's decision is in direct conflict with a decision of a federal court of appeals. Moreover, the presence of those conflicts alone does not reflect the true dimensions of the importance of this case. Simply put, the application of state tort law to the manner in which unions administer and enforce their collective bargaining agreements is inconsistent with the national labor policy. State tort law, unlike the duty of fair representation, would deprive unions of the necessary latitude to decide how best to serve the needs of the bargaining unit within the limits of their negotiating strength and other scarce resources. The prospect of enormous tort damage awards may well drive some unions to avoid negotiating contractual safety provisions altogether, with the counterproductive result that workers generally will be deprived of any representation with respect to workplace hazards. Finally, application of the highly individualized tort law of fifty different states is directly at odds with the federal interest in uniformity.

1. The beginning point for both questions presented by this petition is that the only conduct asserted here as a basis for state tort liability is the union's administration and enforcement of a collective bargaining agreement. This case requires a decision whether liability based on the union's performance of that function must be determined according to principles of federal labor law, rather than state tort law.

In Idaho, as elsewhere, it is the employer who has the responsibility under state law to provide a safe workplace.[6] The union has no independent duty under state law to police the employer's compliance with its safety responsibilities, nor could the state impose such a duty. Respondents' claim is based instead on the proposition that the union had assumed a duty by contract, and the Idaho Supreme Court similarly found a duty based on that contract and the union's administration of it.

The contract in question is the collective bargaining agreement between the employer and the union. The complaint on its face makes clear that the respondents' claims are predicated on this contract, and on the union's performance of its duty as representative of the employees to enforce this contract. Thus, the complaint states: the union "undertook to act as accident prevention representative and enforcer of the Company-union agreement and did it negligently." Complaint, quoted, supra, at 5-6. In particularizing this allegation of "negligence," the complaint goes on to allege a series of acts that the union "failed" to take: "[i]t failed to develop adequate safety programs for its union membership"; "[i]t failed to require mine evacuation on first evidence of smoke underground"; "[i]t failed to provide fire drills"; "[i]t failed to require adequate protection against spontaneous combustion of discarded timbers"; "[i]t failed to require adequate emergency egress from the mine." *Id.*

The complaint alleged only these failures to take affirmative action, all of which assume that the union had a duty to act. The complaint did not allege a single instance where, absent such a duty to act, the union negligently caused harm to the employees. Moreover, after the completion of discovery, the plaintiffs were still unable to point to a single instance where—assuming the

[6] *See Deshazer v. Tompkins*, 89 Idaho 347, 404 P.2d 604, 608 (1965); *Otto v. Mell*, 94 Idaho 109, 482 P.2d 84, 86 (1971).

contract did not place upon the union a duty to act—the union had negligently caused any harm.[7]

Upon review of this record, the trial court concluded (103a-104a):

> No matter how the plaintiffs couch their arguments, they are attempting to hold the defendant liable for conduct of an advisory safety committee created and defined by the collective bargaining agreement. The plaintiffs are complaining about the manner in which the Union carried out the collective bargaining agreement, essentially saying the Union advisory committee should have done more. This is obviously a question of the Union's representational duties and these representational duties are governed by the National Labor Relations Act.

The Idaho Supreme Court rejected that conclusion. It saw no difference between a claim for tort liability based on the manner in which the union represents employees under a collective bargaining agreement, and a claim for tort liability based on any other conduct (30a-31a).[8]

> No provision of the National Labor Relations Act provides that it is federal policy to immunize labor unions for their negligent acts.
>
> • • •

[7] After discovery had been closed, respondents attempted to resist the union's motion for summary judgment by asserting two additional allegations of failure to take affirmative action: the union's alleged failure to bargain for stricter safety provisions in the collective bargaining agreement, and the union's alleged failure to hire safety experts to serve as the union representatives on the safety committee (104a).

[8] The following passages are taken from the Idaho Supreme Court's opinion in September 1986, prior to *Hechler*. As noted above, however, after *Hechler* the Idaho Supreme Court considered petitioner's arguments based on *Hechler* and announced: "We . . . adhere to our opinion as written." (8a). Thus the pre-*Hechler* opinion and the post-*Hechler* opinion together constitute the court's explanation of its decision.

> We remain of the view expressed by the majority of this court in *Dunbar*, 100 Idaho at 527 [114a].
>
> > We are cited to no authority, for example, which insulates a union for its negligent and tortious conduct toward one of its members, *i.e.*, if a member of a union was struck by a motor vehicle owned by the union and operated by one of its officials during the course of his employment for the union, we cannot believe the union would be insulated from liability on the basis that the only duty it owed toward its members was that of fair representation. If a union's unreasonable conduct results in the death of one of its members, it should not be excused from liability because of the legal fortuity of its organizational status anymore than if its conduct brought death to a nonunion member.

The Idaho Supreme Court went on to find the basis for a tort duty under state law in the collective bargaining agreement and the union's activities under it (29a) (emphasis removed):

> Because the Union, pursuant to the provisions of the collective bargaining agreement, had contracted to inspect and in fact, inspected the mine, it owed the (minimal) duty to its members to exercise due care in inspecting and in reporting the findings of its inspection.

Then, after listing a number of safety hazards that were alleged by the respondents to have contributed to the miners' deaths, the Idaho Supreme Court explained how the union's actions, or failures to act, under the contract could support liability for negligence under state law (28a-29a):

> The Miners contend that most of these deficiencies could have been observed, and should have been observed, in the course of a reasonable inspection and, further, that recommendations could have, and should have, been made with regard to these deficiencies. A reasonable inference which the trial court should have drawn in favor of the miners is that inspecting personnel were negligent in not seeing and reporting some of those conditions.

It is therefore clear that the only conduct on which the Idaho Supreme Court predicated its conclusion that the union may be held liable under state tort law was the union's administration and enforcement of the safety and health article of the collective bargaining agreement.

2. This case thus presents the question whether under state tort law a union can be held liable for personal injuries that are alleged to have been caused by its negligence in the administration and enforcement of a collective bargaining agreement, or whether the federal duty of fair representation is the sole source of any union liability that could result from such conduct.

In a series of cases beginning with *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944), this Court has defined the duty of fair representation that unions owe to members of the bargaining units for which they are the exclusive representatives. In *Vaca v. Sipes*, 386 U.S. 171 (1967), the Court held that the union's duty of fair representation governs its conduct in negotiations "and in its enforcement of the resulting collective bargaining agreement." *Id.* at 177. The duty requires the union "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* The Court further held that federal law exclusively governs the determination whether a breach of this duty has occurred. *Id.*

After *Vaca* the law has generally been well settled that the duty of fair representation preempts any use of state law to impose a different standard of conduct on a union for the manner in which it represents members of its bargaining unit. *E.g.*, *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 292, 301 (1971); *Richardson v. United Steelworkers of America*, 864 F.2d 1162,

1166-67 (5th Cir. 1989), *petition for cert. filed*, 57 U.S.L.W. 3828 (June 5, 1989) (No. 88-2009); *Bache v. American Telephone & Telegraph Co.*, 840 F.2d 283, 285-86 (5th Cir.), *cert. denied*, 109 S. Ct. 219 (1988); *Jones v. Truck Drivers Local Union 299*, 838 F.2d 856, 860-61 (6th Cir. 1988); *Johnson v. United Food & Commercial Workers Local 23*, 828 F.2d 961, 967 (3d Cir. 1987); *Peterson v. Air Line Pilots Ass'n*, 759 F.2d 1161, 1168-70 (4th Cir.), *cert. denied*, 474 U.S. 946 (1985); *Maynard v. Revere Copper Products, Inc.*, 773 F.2d 733, 735-36 (6th Cir. 1985).

The Idaho Supreme Court's decision in this case, however, carves out one subject of union representational activities—safety—and imposes on the union, in addition to the federal duty outlined by this Court in *Vaca*, a duty of "due care" under state tort law. That decision conflicts in the squarest possible way with the decision of the United States Court of Appeals for the First Circuit in *Condon v. Local 2944, United Steelworkers of America*, 683 F.2d 590 (1st Cir. 1982). In *Condon* an employee was injured on the job and sued his union for negligence. As here, the basis for his claim was the union's activities under the safety and health article of its collective bargaining agreement. That article, in terms virtually identical to the safety and health article in this case, created a joint safety and health committee to "advise with the Company concerning safety and health matters."[9] 683 F.2d at 591 n.1. As here, the plaintiff alleged that the union had "fail[ed] to properly inspect the working premises for safety hazards and to remove those hazards." *Id.* at 592. And, as here, the plaintiff argued that the union "under[took] to fulfill a safety monitoring

[9] The virtual identity of these provisions of the two contract articles, *compare* 683 F.2d at 591-92 *with* 169a-171a, is not a coincidence. The union in both cases was the Steelworkers, and both articles in this respect generally followed the model provisions recommended by the United Steelworkers of America to its local unions.

function" and could be held liable under state law if it failed to exercise reasonable care in performing that function. *Id.* at 594.

The First Circuit held that Condon's claim was preempted by federal law. It rejected Condon's argument that the state-law duty of reasonable care "arose independent of [the Union's] obligations under the collective bargaining agreement," *id.*, and held that Congress had occupied the entire field of defining a "union's rights and duties as the exclusive bargaining agent in carrying out its representational function" and had "closed it to state regulation." *Id.* at 594-95. The court therefore affirmed a summary judgment that dismissed the plaintiff's claims.

The question on which these decisions are in conflict was presented in *Hechler* but the Court did not reach it. Justice Stevens argued in a separate opinion that the issue should have been reached and should have been decided in favor of preemption.

> Respondent has alleged nothing more than a breach of the Union's federal duty of fair representation. She has not alleged that the Union breached any specific promise made to her, and her argument that Florida law has augmented the Union's representational duties is plainly pre-empted by federal law.

481 U.S. at 865 (Stevens, J., concurring in part and dissenting in part).

This Court should grant the writ and address the issue in this case because it is an important issue of federal law. The federal duty of fair representation has been carefully developed, consistent with national labor policy, to give unions the latitude they need to "balanc[e] individual and collective interests" and determine for themselves what is in the best interest of "the bargaining unit as a whole." *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 742 (1981). That policy recognizes that unions are often confronted with competing

demands on scarce resources and limits on their bargaining power, so that they cannot always satisfy all of the legitimate objectives of the bargaining unit. *See, e.g., Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-39 (1953). The duty of care, which has developed under state tort law for different purposes, does not accommodate these concerns. If Idaho law, for example, may impose on the Steelworkers millions of dollars in tort liability, based on plaintiffs' allegations that the union failed to hire safety experts or otherwise devote more resources to "inspecting" the Sunshine Mine, the union and its members will not remain free to set their own priorities through democratic processes; the union will be forced, if it undertakes any safety activities at all, to make a major commitment of resources to guard against possible tort liability.

Some unions will protect themselves against that liability by electing *not* to bargain for safety committees or safety clauses in their collective bargaining agreements. Such safety programs are often an important front-line protection against unsafe or unhealthy conditions. If unions drop out of such activities, workers will lose this collective protection and will be left to depend entirely on sporadic on-site visits from chronically understaffed government agencies. Such a result would "not serve the interest of [employees] and would retard rather than advance the goals of the National Labor policy." *Bryant v. United Mine Workers*, 467 F.2d 1, 5 (6th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973).

The widespread assertion of such claims against unions is not merely hypothetical, but is a very real concern. Recent years have seen increasingly frequent attempts by employees injured on the job to bring state tort-law suits against unions for alleged negligence in performing (or failing to perform) safety inspections under collective bargaining agreements. Over 60 percent of collective bargaining agreements covering manufacturing employees contain provisions establishing a joint labor-management

safety committee.[10] Because workers' compensation awards generally are the exclusive means by which an employee injured on the job may recover from his employer, and because the dollar amounts of such awards pale in comparison to the large sums awarded by juries in tort actions, it has become almost commonplace for an injured worker to sue third parties in hopes of recovering the large amounts of tort damages that he cannot recover from his employer. Increasingly, unions with safety and health clauses in their collective bargaining agreements have become the targets of these third-party actions, and the stakes are extremely high.[11]

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[10] Bureau of National Affairs, Basic Patterns in Union Contracts, at 127 (11th ed. 1986).

[11] *See, e.g., Sams v. United Food & Commercial Workers*, 835 F.2d 848 (11th Cir. 1988); *Condon v. Steelworkers Local 2944*, 683 F.2d 590 (1st Cir. 1982); *Bryant v. Mine Workers*, 467 F.2d 1 (6th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973); *Skipper v. Hoff & Associates*, 684 F. Supp. 707 (S.D. Ga. 1987); *Pockalny v. Elwell Parker Elec. Co.*, 608 F. Supp. 570 (W.D.N.Y. 1985); *Preisler v. Steelworkers*, No. N-83-159 (D. Conn., Feb. 24, 1984); *Burgess v. Allendale Mut. Ins. Co.*, 111 L.R.R.M. 2997 (S.D. Ga. 1982); *Mahoney v. Chicago Pneumatic Tool Co.*, 111 L.R.R.M. 2839 (W.D. Mich. 1982); *Wilson v. United Mine Workers*, Cv. No. 78-G-1362-S (N.D. Ala., June 3, 1980); *Globig v. Johns-Manville Sales Co.*, 486 F. Supp. 735 (E.D. Wis. 1980); *Hartsfield v. Seafarers Int'l Union*, 427 F. Supp. 264 (S.D. Ala. 1977); *House v. Mine Safety Appliances Co.*, 417 F. Supp. 939 (D. Idaho 1976), *aff'd in part and rev'd in part on other grounds*, 573 F.2d 609 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978); *McColgan v. Mine Workers*, 124 Ill. App. 3d 825, 464 N.E.2d 1166 (1984), *cert. denied*, 470 U.S. 1051 (1985); *Helton v. Hake*, 564 S.W. 2d 313 (Mo. App.), *cert. denied*, 439 U.S. 959 (1978); *Brooks v. New Jersey Manufacturers Ins. Co.*, 170 N.J. Super. 20, 405 A.2d 466, *certif. denied*, 81 N.J. 413, 408 A.2d 806 (1979); *Carollo v. Forty-Eight Insulation, Inc.*, 252 Pa. Super. 422, 381 A.2d 990 (1977); *Gerace v. Johns-Manville Corp.*, 95 L.R.R.M. 3282 (Pa. Ct. C.P. 1977), *aff'd* 337 Pa. Super. 634, 487 A.2d 442 (1984); *Higley v. Disston*, 93 L.R.R.M. 2443 (Wash. Super. 1976); M. MALIN, INDIVIDUAL RIGHTS WITHIN THE UNION 406-10 (1988).

The federal policy favoring uniformity also would be undermined by the Idaho Supreme Court's decision. Many unions, like the Steelworkers, regularly enter into master agreements that cover all of an employer's workplaces throughout the country. If the decision of the Idaho Supreme Court were allowed to stand, a union that engaged in identical conduct in administering and enforcing identical contractual provisions would not be subject to the same rules of liability or standards of conduct everywhere. Instead, the risk of liability would vary from state to state depending upon the idiosyncracies of tort law in each state. The disruption of federal policy that this Court described in *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 103-104 (1962), would equally occur here:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation.

The decision below likewise would undermine the federal interest in uniformity as among different subjects that unions address in representing employees. On every other subject, including such subjects as seniority, pensions and fringe benefits, severance payments, and discharge and discipline, unions are held to one standard of conduct, as defined by the federal duty of fair representation—a standard that does not allow for the imposition

of liability for failure to exercise "due care."[12] But where workplace safety is concerned, union conduct would be governed by the highly individualized tort law duties adopted by each state. In this one area alone, unions would be deprived of the discretion which federal labor law and the duty of fair representation seek to guarantee, to deal as they and their members deem best with problems in the workplace.

In order to avoid this clash of state tort law with federal labor policy, this Court should grant this petition and review the judgment of the Idaho Supreme Court.

3. This Court should also grant the writ of certiorari because the Idaho Supreme Court's decision on remand is inconsistent with this Court's decision in *Hechler*. Indeed, the Idaho Supreme Court's most recent opinion, along with all of its other opinions in this case, displays an unremitting hostility to federal preemption.[13]

Before this Court decided *Hechler*, the Idaho Supreme Court acknowledged that "the nature and scope of the Union's duty" were defined by the safety and health provisions of the collective bargaining agreement (33a). In *Hechler*, this Court held that Section 301 preempted Hechler's state-law tort claim for that very reason:

> [A] court would have to ascertain, first, whether the collective-bargaining agreement in fact placed an implied duty of care on the Union to ensure that Hechler was provided a safe workplace, and, second, *the nature and scope of that duty*, that is, whether

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[12] See cases cited at pages 15-16, *supra*.

[13] Although this question is presented by the Idaho Supreme Court's decision, there would be no need to reach it if the Idaho Supreme Court were reversed on the first question presented. If the duty of fair representation precludes a state from holding a union to the duty of "due care" in administering the safety provisions of a collective bargaining agreement, there would be no occasion for further proceedings in this case.

> and to what extent, the Union's duty extended to the particular responsibilities alleged by respondent in her complaint. Thus, in this case, as in *Allis-Chalmers*, it is clear that "questions of contract interpretation . . . underlie any finding of tort liability." 471 U.S., at 218.

481 U.S. at 862 (emphasis added). On remand, the Idaho Supreme Court sought to avoid that holding by changing its position that the plaintiffs' claims depended upon the collective bargaining agreement (5a):

> In the instant case we are not faced with looking at the Collective Bargaining Agreement to determine whether it imposes some new duty upon the union—rather it is conceded the union undertook to inspect and, thus, the issue is solely whether that inspection was negligently performed under traditional Idaho tort law.

As the dissent pointed out, however, there was no such "concession." (page 9, *supra*).

The force of preemption under *Hechler* cannot be avoided by pretending that it is unnecessary to interpret the collective bargaining agreement. The union never conceded that it was performing any safety activities other than those that the collective bargaining agreement authorized, and there was a major dispute between the parties over what the collective bargaining agreement authorized and also over what the union in fact was doing.

Respondents argued that the collective bargaining agreement created a duty to "inspect" the mine. The union argued that the collective bargaining agreement prescribed a more limited role.[14] It merely allowed the

[14] In its brief to the Idaho Supreme Court following the decision in *Hechler*, the union argued:

> The contract . . . nowhere describes the union's general safety functions as "inspections." The function of the Safety Committee is "to advise with the Plant Manager concerning safety and health matters," including to "[c]onsider existing practices and rules relating to safety and health, formulate suggested changes in existing practices and rules, and recommend adoption of new practices and rules." [*Rawson v. United Steelworkers*, 726 P.2d 742, 749 (Idaho 1986)]. The alleged provision for "inspection" consists merely of authority for a representative to "*accompany* the State Mine Inspector or his Deputy" on *State* inspections of the mine and once a month "to *accompany* the [company's] Safety Engineer on *tours* of the mine." *Id.* (emphasis added).[9]
>
> Appellants have contended that these contract provisions created a right, and therefore a duty, to inspect the mine. But the union's position is that these provisions did not give it the right, let alone the duty, to make *inspections* of the mine. Moreover, even if the Court were to focus on what the union safety committee was actually doing, it would be impossible to determine the scope of any duty the union had thereby assumed without reference to what had been agreed in the contract. As Justice Bakes observed in his dissent, the terms of the collective bargaining agreement "not only outlined the union's responsibilities in regard to the Safety Committee, but also limited the union's right to interfere in the operation of the mine." 726 P.2d at 764. If the question whether the union was entitled or obligated to "inspect" the mine had arisen in a dispute between the union and Sunshine Mine, federal law would govern the interpretation of the contract. The "need for federal uniformity in the interpretation of contract terms"

[9] The only use of the term "inspect" in connection with the union's activities appears in the separate section of the Safety and Health article that describes the procedure to be followed when an individual employee made a specific complaint that he was "being required to work under conditions which are unsafe beyond the normal hazards inherent in the operation in question . . . ." Art. IX § 2. It is undisputed that the inspections called for by this section in response to such complaints were wholly distinct from the unions' rights in relation to generalized conditions in the mine. *See* Dep. of Lavern Albert Melton, July 6, 1983, at 26-30.

union to name half of the advisory safety committee and to send a representative to "accompany" management's safety engineer on a monthly tour of some part of the

mine and to "accompany" the Idaho mine inspector on his periodic inspections (pages 3-4, *supra*; 169a-171a). It affirmatively "limited the union's right to interfere in the operation of the mine" (44a, Justice Bakes, dissenting). The union was even precluded from *filing grievances* over general safety conditions unless "a majority of the entire safety committee," necessarily including at least one management representative, had concurred in a recommendation which was not carried out (171a).

Given this dispute, the existence of any union duty to "inspect" and the scope of any such duty necessarily depends upon interpretation of the collective bargaining agreement. Thus, here, as in *Allis-Chalmers Corp. v. Lueck*, "the extent of [the] duty ultimately depends upon the terms of the agreement between the parties" and, as a consequence, the extent of the duty is "tightly bound with questions of contract interpretation that must be left to federal law." 471 U.S. at 215.

On this question, as well as on the preemptive effect of the duty of fair representation, the decision of the Idaho Supreme Court conflicts with decisions of federal courts of appeals. In *Michigan Mutual Ins. Co. v. United Steelworkers of America*, 774 F.2d 104 (6th Cir. 1985), the union was accused of negligence under state law in "perform[ing] safety services for its members." *Id.* at 105. Because the source of the union's asserted duties was the safety provision of the collective bargaining agreement, the Sixth Circuit held that the claim for "negligent performance of duties it voluntarily assumed," *id.*, was preempted by Section 301 under *Allis-Chalmers*.

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compels application of the same federal law to interpret the agreement when the same issue arises in another context. *See Hechler*, 107 S. Ct. at 2168; *see also id.* at 2165. The preemptive effect of federal law cannot be avoided by assuming one disputed interpretation of the contract and using that interpretation as the cornerstone for liability.

Respondent's Supplemental Brief, Case No. 15338, at 13-15 (filed Sept. 23, 1987).

Id. See also Sams v. United Food & Commercial Workers Union, 835 F.2d 848 (11th Cir. 1988) (under *Hechler*, section 301 preempted state-law claim by injured employees that union had breached its "duty of care").

The question whether the Idaho Supreme Court's decision conforms to *Hechler* is important for this Court to resolve for the same reason that the first question presented by this case—the preemptive force of the duty of fair representation on matters of safety—is important to resolve. The use of state-law principles to interpret the safety articles of collective bargaining agreements would leave unions subject to varying standards of conduct in different states—even where there is a single nationwide contract—and would disrupt the careful balance of interests that the federal labor policy was designed to achieve.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted to review the judgment of the Supreme Court of Idaho.

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No.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioners,

v.

THARON RAWSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR SETH RAWSON AND CINDY RAWSON; BERNIECE JOHNSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON AND JOHN RUSSELL JOHNSON; LAURA DUNBAR, AS GUARDIAN AD LITEM FOR RICKINA ROSSITER AND GLEN ROSSITER, JR.; AND MARY WOOD, AS GUARDIAN AD LITEM FOR LESLIE D. WOOD,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

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APPENDIX A

1989 Opinion No. 121

IN THE SUPREME COURT
OF THE STATE OF IDAHO

Boise February 1988 Term

Filed: December 22, 1988

Frederick C. Lyon, Clerk

No. 15338

THARON RAWSON, individually and as Guardian ad Litem for her minor children, SETH RAWSON and CINDY RAWSON, heirs of JOHN R. RAWSON, deceased,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

BERNIECE JOHNSON, individually and as Guardian ad Litem for MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON and JOHN RUSSELL JOHNSON,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

LAURA DUNBAR, as Guardian ad Litem for RICKINA ROSSITER and GLEN RAYMOND ROSSITER, JR., minor children and heirs of GLEN RAYMOND ROSSITER,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

MARY WOOD, as Guardian ad Litem for LESLIE D. WOOD, her minor child, heir of DON B. WOOD, deceased,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone. Honorable Watt E. Prather, District Judge.

On remand from the United States Supreme Court following grant of Writ of Certiorari on issue of preemption under Labor Management Relations Act. Held: Claim under Idaho tort law is not federally preempted.

Kenneth B. Howard, Jr., Coeur d'Alene, Idaho, and Lloyd J. Webb, Twin Falls, Idaho, attorneys for the Appellant.

Bredhoff and Kaiser, Washington, D.C., attorneys for the Respondent. George H. Cohen argued.

Eberle, Berlin, Kading, Turnbow & Gillespie, Boise, Idaho, appeared as Amicus Curiae. Richard B. Kading argued.

HUNTLEY, J.

ON REMAND FROM WRIT OF CERTIORARI

1986 Opinion No. 30, issued February 24, 1986, was withdrawn upon grant of rehearing and a new Opinion No. 124 of September 4, 1986, Rawson v. United Steelworkers of America, 111 Idaho 630, 726 P.2d 742, was entered. The United States Supreme Court granted certiorari and ultimately vacated the latter opinion, remanding to this Court for further consideration in light of IBEW, AFL-CIO v. Hechler, 481 U.S. 851, 107 S.Ct. 2161 (1987). This opinion is issued pursuant to the remand.

I.

The directive of the United States Supreme Court requires that we reconsider this case in light of the single issue presented in *Hechler, supra.* That issue is whether the state-law tort actions of the plaintiffs herein are preempted by § 301 of the Labor Management Relations Act of 1947 (LMRA), 61 Stat. 156, 29 U.S.C. § 185.

In *Hechler, supra,* the court had before it a substantially different issue than that presented herein. The court stated the issue as follows:

> The question presented by this case is whether a state-law tort claim that a union has breached its *duty of care to provide* a union member with *a safe workplace* is sufficiently independent of the collective bargaining agreement to withstand the pre-emptive force of § 301. (Emphasis supplied.)

Justice Blackman characterized Hechler's complaint as follows:

> In her complaint, she alleged that "pursuant to contracts and agreements entered into by and between" the Union and Florida Power, and "pursuant to the relationship by and between" the Union and respondent, the Union had a duty to ensure that respondent "was provided safety in her work place and safe

> work place," and to ensure that respondent "would not be required or allowed to take undue risks in the performance of her duties which were not commensurate with her training and experience."

And Justice Blackman noted:

> Respondent conceded: "The nature and scope of the duty of care owed [her] is determined by reference to the collective bargaining agreement."

107 S.Ct. at 2163, 4.

In the instant case we are not concerned with imposing a duty on the Union to provide a safe work place. Rather, the issue here is whether the LMRA pre-empted prosecution of a tort action where the activity was concededly undertaken and the standard of care is imposed by state law without reference to the collective bargaining agreement.

In Dunbar v. United Steelworkers of America, 100 Idaho 523, 602 P.2d 21 (1979), *cert. denied*, 446 U.S. 983 (1980), this Court dealt with the issue of federal pre-emption of the field under the LMRA. The steelworkers argue that all relationships between a union and its members resulting from a collective bargaining agreement are pre-empted, with the union's duty being only that of "fair representation." Although the N.L.R.B. has been given exclusive jurisdiction to regulate and interpret collective bargaining agreements, it has no authority to award damages in tort in favor of members and against the union. We remain of the view expressed in *Dunbar*:

> We are cited to no authority, for example, which insulates a union for its negligent and tortious conduct toward one of its members, i.e., if a member of a union was struck by a motor vehicle owned by the union and operated by one of its officials during the course of his employment for the union, we can-

> not believe the union would be insulated from liability on the basis that the only duty it owed toward its members was that of fair representation. If a union's unreasonable conduct results in the death of one of its members, it should not be excused from liability because of the legal fortuity of its organizational status anymore than if its conduct brought death to a nonunion member.

100 Idaho at 527, 528, 602 P.2d at 25, 26.

In *Hechler*, *supra*, the court further focused the issue:

> Under the principle set forth in *Allis-Chalmers* we must determine if respondent's claim is sufficiently independent of the collective-bargaining agreement to withstand the pre-emptive force of § 301. Respondent's state-law tort claim is based on her allegation that the Union owed a duty of care to provide her with a safe workplace and to monitor her work assignments to ensure that they were commensurate with her skills and experience. Under the common law, however, it is the *employer*, not a labor union, that owes employees a duty to exercise reasonable care in providing a safe workplace.

107 S.Ct. at 2167.

In the instant case we are not faced with looking at the Collective Bargaining Agreement to determine whether it imposes some new duty upon the union—rather it is conceded the union undertook to inspect and, thus, the issue is solely whether that inspection was negligently performed under traditional Idaho tort law.

In *Hechler*, *supra*, the court noted:

> Respondent's allegations of negligence assume significance if—and only if—the Union, in fact, had assumed the duty of care that the complaint alleges the Union breached. The collective-bargaining agreement between the Union and Florida Power, and

ancillary agreements between those parties, contain provisions on safety and working requirements for electrical apprentices on which Hechler could try to base an argument that the Union assumed an implied duty of care. In order to determine the Union's tort liability, however, a court would have to ascertain, first, *whether the collective-bargaining agreement in fact placed an implied duty of care* on the Union to ensure that Hechler was provided a safe workplace, and, second, the nature and scope of that duty, that is, *whether and to what extent, the Union's duty extended to the particular responsibilities alleged by respondent* in her complaint. Thus, in this case, as in *Allis-Chalmers*, it is clear that "questions of contract interpretation . . . underlie any finding of tort liability." (Emphasis supplied.)

107 S.Ct. at 2168.

In the instant case there is no need to look to the agreement to discern whether it placed an "implied duty" on the union or whether the duty "extended to the particular responsibilities alleged" because here the parties concede the union did actively undertake the subject inspection duties. The only question is whether duties clearly undertaken were performed negligently.

The *Hechler* court noted further in footnote 5:

In her brief to this Court, respondent argues, for the first time, that her claim is not dependent on an interpretation of the collective-bargaining agreement, because the union's duty of care to her may arise through independent state law responsibilities placed upon the Union simply by virtue of its relationship with its members, rather than as a result of the collective-bargaining agreement. Brief for Respondent 15-19. Respondent points out that she alleged that the Union owed her a duty of care "pursuant to contracts and agreements" entered into between

the Union and Florida Power "*and* pursuant to the relationship by and between" the Union and Hechler. App. 4 (emphasis added).

Even assuming that respondent's pleadings may be construed liberally as stating that various, unenumerated Florida laws place a duty of care on a union to provide a safe workplace for its members, respondent effectively abandoned that theory in the lower courts and we decline to consider the argument here.

107 S.Ct. at 2168.

Thus, the instant case is clearly distinguishable from *Hechler* in that here the state tort basis of the action was not abandoned, but has been pursued consistently both at the trial and appellate levels and the tort exists without reference to the collective bargaining agreement.

Accordingly, *Hechler* is inapposite and does not stand for the proposition that a federal LMRA pre-emption exists in the instant case.

The June 1988 opinion of the United States Supreme Court in LINGLE v. NORGE, —— U.S. ——, 108 S.Ct. 1877 (June 6, 1988), would appear to be dispositive and controlling of this case. In *Lingle*, the question presented was whether an employee, covered by a collective bargaining agreement that provided her with a contractual remedy for discharge without just cause, could enforce her state law remedy for retaliatory discharge.

In holding that the state tort remedy was not preempted by § 301 of the LMRA, the court stated:

To defend against a retaliatory discharge claim, an employer must show that it had a nonretaliatory reason for the discharge, cf. *Loyola University of Chicago v. Illinois Human Rights Comm'n*, 149 I. App. 3d 8, 500 N.E. 2d 639 (1986); this purely factual inquiry likewise does not turn on the mean-

> ing of any provision of a collective-bargaining agreement. Thus, the state-law remedy in this case is "independent" of the collective-bargaining agreement in the sense of "independent" that matters for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement.
>
> . . . .
>
> . . . even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 pre-emption purposes.

Likewise, in the instant case, no interpretation of the collective-bargaining agreement is required to determine whether the union member of the inspection team committed a tort when he committed various acts and omissions such as failure to note the self-rescuers were stored in boxes with padlocks or that the activating valves of the oxygen-breathing-apparatuses were corroded shut. Rather, such alleged acts of negligence are measured by state tort law.

We therefore adhere to our opinion as written.

II.

Our Opinion No. 124 of September 4, 1986, ruled upon two primary issues other than the pre-emption issue in Part III thereof. In Part I we ruled for the union and against claimants on the fraud cause of action. In Part II we ruled for the claimants and against the union on the issue of whether a negligent cause of action would lie under Idaho law.

Counsel invites this Court to revisit those issues in this hearing on remand from certiorari. However, since

the United States Supreme Court has jurisdiction only to require our reconsideration of matters involving federal law, our decisions in Parts I and II remain the law of the case and we decline to reopen them under certiorari procedure.

Costs to appellants, not attorney fees awarded.

SHEPARD, C.J. and BISTLINE, J., concur.

SHEPARD, C.J. special concurrence.

I agree with the majority opinion that certiorari issued by the United States Supreme Court directs only that this Court consider the preemption issue. I agree with the majority opinion insofar as it treats that preemption question. However, I continue to adhere to my position expressed in Rawson v. United Steelworkers, 111 Idaho 630, 726 P.2d 742 (1986), wherein I dissented from Part II of the Court's decision reversing the issue of summary judgment on the negligence claim.

BAKES, J., dissenting:

Aside from the fact that I believe the majority of this Court seriously errs in its evaluation of federal labor law, as expressed in my dissent in our original opinion, Rawson v. United Steelworkers of America, 111 Idaho 630, 726 P.2d 742 (198—) (Bakes, J., dissenting), and as set forth in the dissenting opinion of Johnson, J., in this rehearing, in which I concur, I believe the Court has now erred egregiously in its description of the factual record in this case. The majority opinion states, *ante* at 5, that "[i]n the instant case we are not faced with looking at the Collective Bargaining Agreement to determine whether it imposes some new duty upon the union —rather *it is conceded* the union undertook to inspect and, thus, the issue is solely whether that inspection was negligently performed under traditional Idaho tort law." (Emphasis added.)

The union has never conceded that it undertook to inspect the Sunshine Mine. The Court's opinion does not point to any pleading or any evidence in the record to sustain either its factual conclusion that the union undertook to inspect the mine, or its statement that the union has "conceded" that it undertook to inspect. There is absolutely nothing to support either of those two statements.

Rather, what the record discloses is that the union, pursuant to its obligations under the collective bargaining agreement, appointed certain members to the safety committee established by the collective bargaining agreement. That safety committee, which also was composed of management personnel, conducted whatever safety inspections which were made. There is absolutely nothing in the record to establish any *respondeat superior* relationship between the safety committee established under the collective bargaining agreement and the union. Nor is there anything else in the record establishing that anyone else on behalf of the union inspected the mine.

The collective bargaining agreement reserved the control and operation of the mine to the company. The union had no authority under the agreement to inspect the mine. It was the safety committee, formulated by the collective bargaining agreement, which undertook any inspection which was done, not the union. The union *has never conceded* that it undertook to inspect, and the majority's statement to that effect is totally unsupported by the record in this case.

Even assuming that the safety committee, which was composed of both management and union representatives, had made recommendations to correct unsafe conditions, and those recommendations had been called to the union's attention, the union could only have attempted to remedy those unsafe conditions through the procedures set out in the collective bargaining agreement. The safety committee was not the agent of the union. The union had no

respondeat superior responsibility for the safety committee's action or inaction. Nor did the union have control of the mine. It was only through the grievance procedure set out in the collective bargaining agreement that the union could have influenced the employer to correct unsafe conditions which might have been called to the union's attention by the safety committee. Accordingly, the plaintiff's claim against the union is inextricably intertwined with the collective bargaining agreement, and federal, not state law is applicable. I.B.E.W., AFL-CIO v. Hechler, 481 U.S. ——, 107 S.Ct. 2161 (1987). Under federal law the only duty which the union owed to its members was that of fair representation, *i.e.*, to adequately and fairly represent its members and pursuing the members' rights under the collective bargaining agreement to correct unsafe working conditions in the mine. The state tort law claims in this case conflict with the union's duty of fair representation under federal labor law, and accordingly in my view state tort law in this case is preempted. I.B.E.W., AFL-CIO v. Hechler, *supra*.

JOHNSON, J., dissenting.

I dissent from the decision of the majority holding that the tort action against the Union based on Idaho law is not pre-empted by § 301 of LMRA. My view is that there is pre-emption.

In general, I concur with and adopt that part of the dissenting opinion of Justice Bakes in *Rawson v. United Steelworkers of America*, 111 Idaho 630, 649-52, 726 P.2d 742, 761-65 (1986), *vacated*, 107 S.Ct. 2475 (1987) (Rawson I) in which he expresses his view that there is pre-emption.

I am persuaded that *IBEW, AFL-CIO v. Hechler*, 481 U.S. ——, 107 S.Ct. 2161 (1987) requires us to hold that there is pre-emption. I am not persuaded that *Lingle v. Norge*, —— U.S. ——, 108 S.Ct. 1877 (1988) supports a holding that there is no pre-emption.

In *Hechler* the Court ruled that interpretation of the collective bargaining agreement would be necessary to determine whether the Union had assumed the duty of care to provide a safe work place and "the nature and scope of that duty." 107 S.Ct. at 2168. The Court concluded: "The need for federal uniformity in the interpretation of contract terms therefore mandates that here, as in *Allis-Chalmers*, respondent is precluded from evading the pre-emptive force of § 301 by casting her claim as a state-law tort action." *Id.* In my opinion, this statement applies with equal force to this case.

The complaint in this case states that the Union "undertook to act as accident prevention representative and enforcer of the Company-union agreement and did it negligently." Except for any duty imposed by the collective bargaining agreement, the Union had no duty for the safety of its members. The existence of this duty and its nature and scope are dependent on the meaning of the collective bargaining agreement. In *Rawson I* this Court said that "the provisions of the collective bargaining agreement . . . determine . . . the nature and scope of the Union's duty." *Id.* at 640, 726 P.2d at 752. I agree and for this reason would hold that *Hechler* applies.

Lingle does not dictate a different result. There, the Supreme Court stated that "the state-law remedy . . . is 'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement." 108 S.Ct. at 1882. The Court distinguished *Allis-Chalmers* and *Hechler* on the ground that in those cases, "pertinent principles of state law required construing the relevant collective-bargaing agreement." *Id.* n.7. Here, I am unable to see how a court could ascertain the duty of the Union without determining the meaning of the collective bargaining agreement. This would require the interpretation or construction of the collective bargaining agreement.

APPENDIX B

1986 Opinion No. 124

IN THE SUPREME COURT
OF THE STATE OF IDAHO

Boise, June 1986 Term

Filed: September 4, 1986

Frederick C. Lyon, Clerk

No. 15338

THARON RAWSON, individually and as Guardian ad Litem for her minor children, SETH RAWSON and CINDY RAWSON, heirs of JOHN P. RAWSON, deceased,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

BERNIECE JOHNSON, individually and as Guardian ad Litem for MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON and JOHN RUSSELL JOHNSON,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

LAURA DUNBAR, as Guardian ad Litem for RICKINA ROSSITER and GLEN RAYMOND ROSSITER, JR., minor children and heirs of GLEN RAYMOND ROSSITER,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

MARY WOOD, as Guardian ad Litem for LESLIE D. WOOD, her minor child, heir of DON B. WOOD, deceased,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

1986 OPINION NO. 30, ISSUED FEBRUARY 24, 1986, IS HEREBY WITHDRAWN AND THIS OPINION IS SUBSTITUTED THEREFOR

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone. The Honorable Watt E. Prather, District Judge.

Appeal from an order granting summary judgment to the United Steelworkers of America in an action for wrongful death. *Affirmed in part, reversed in part and remanded.*

Kenneth B. Howard, Jr., Coeur d'Alene, Idaho; Lloyd J. Webb, Twin Falls, Idaho; and Bruce O. Robinson, Bonners Ferry, Idaho, attorneys for the Appellant.

Margaret L. McMahon, Caldwell, Idaho; George H. Cohen, Washington, D.C.; Robert M. Weinberg, James D. Nelson and Frederick V. Betts, Seattle, Washington, attorneys for the Respondent.

ON HEARING

HUNTLEY, J.

By this appeal, we are called upon to review a trial court's order granting summary judgment to the United Steelworkers of America (hereinafter referred to as U.S.W.A. or the Union) in an action brought by representatives of estates of four miners (hereinafter referred to as "the Miners") who lost their lives in the 1972 Sunshine Mine fire at Kellogg, Idaho, against the Steelworkers' Union on theories of negligence and fraud.

Judge Prather's memorandum opinion in support of his order granting the Steelworkers' Union motion for summary judgment of dismissal of the complaint stated his conclusions:

(1) That the U.S.W.A. was entitled to summary judgment on the Miners' fraud claims;

(2) That the U.S.W.A. was entitled to summary judgment on the Miners' negligence claims; and

(3) That the record established that the Miners' claims related exclusively to the manner in which the U.S.W.A. exercised its authority as collective bargaining representative of the employees at the Sunshine Mine and, hence that this Court should again consider the issue of whether the Miners' claims are preempted under federal labor law.

We affirm the order of summary judgment as to the fraud claim. However, for reasons discussed *infra*, we

reverse the order of summary judgment as to the negligence claim and remand for further proceedings.

I. THE FRAUD CLAIM

The amended complaints allege that the U.S.W.A. made the following representations to its members at the Sunshine Mine:

A. That it was a competent organization for protecting the welfare, safety and interest of its members, and had a concern for said welfare, safety and interest of its members.

B. That it had a reliable degree of expertise in underground mining.

C. That it would develop adequate programs of safety through its Union representatives for the benefit of its members, the rank-and-file of said Union.

D. That it would provide competent Union representatives to participate in the inspections of the mine for safety and accident prevention.

E. That it would enforce the provisions of the Union contract with the Sunshine Mine with regard to safety and accident prevention.

The complaints allege that the above representations were false, that they were relied upon by the employees, and that they were a proximate cause of appellants' decedents' death.

The Miners' brief does not specify whether their claim is one of actual fraud or constructive fraud. However, a party asserting a cause of action based on fraudulent misrepresentation must prove each of the following elements: a representation; its falsity; its materiality; the speaker's knowledge of its falsity or ignorance of its truth; the speaker's intent that it should be acted on by the person and in the manner reasonably contemplated; the hearer's ignorance of its falsity, reliance on its truth,

right to rely thereon, and consequent and proximate injury. Smith v. King, 100 Idaho 331, 597 P.2d 217 (1979).

In an action to prove actual fraud, the claimant must prove that the other party acted with an intent to deceive. Sorenson v. Adams, 98 Idaho 708, 571 P.2d 769 (1977). In a case of constructive fraud, that element is not required. State v. Hightower, 101 Idaho 749, 620 P.2d 783 (1980); Bethlamy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); McGhee v. McGhee, 82 Idaho 367, 353 P.2d 760 (1960).

Summary judgment should be granted only when the pleadings, depositions and admissions, together with affidavits, if any, show that there is no genuine issue as to any material fact. The facts are to be liberally construed in favor of the party opposing the motion, who is also to be given the benefit of all favorable inferences which might be reasonably drawn from the evidence. Anderson v. Ethington, 103 Idaho 658, 651 P.2d 923 (1982).

The record reflects that the U.S.W.A. submitted evidence establishing that it did not represent to the Miners that it had expertise in mine safety or that it could ensure a safe work place. Respondents failed to present evidence contradicting the U.S.W.A.'s showing. When a motion for summary judgment is made and supported by affidavit, an opposing party may not rest upon his pleadings, but must respond by affidavit, deposition or interrogatory setting forth specific facts showing there is a genuine issue for trial. As the trial court observed in its decision granting the Union's motion for summary judgment on the fraud claim:

> The record is . . . bereft of evidence the defendant Union made misrepresentations of fact or that the defendant intended to defraud plaintiffs. On the other hand, the defendant has submitted testimony that the Union did not misrepresent its expertise; the Union members were aware the Union only acted

> in an advisory capacity and that the primary responsibility for ensuring job security lay with each individual Union member and the company.

Since the record reflects that appellants relied only on their pleadings and did not produce the necessary documentation to show that there was a genuine issue for trial, the trial court did not err in granting the motion for summary judgment on the fraud claim.

II. THE NEGLIGENCE CLAIM

The trial court also granted the Union's motion for summary judgment of dismissal on the Miners' negligence claim. The court concluded that the Miners' had not established that the Union owed a duty to the deceased miners. The trial court's memorandum opinion in support of its order granting the motion for summary judgment on the negligence claims reads:

> Plaintiffs seek to hold the Union responsible on negligence theories. A fundamental component of a negligence claim is the existence of a duty toward another. *Hoffman v. Simplot Aviation, Inc.*, 97 Idaho 32, 539 P.2d 584 (1975). A duty is a standard of conduct to which the defendant is required to conform. *Algeria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980). Plaintiffs rely on the collective bargaining agreement and RESTATEMENT (SECOND) OF TORTS, §§ 323 and 324A (1965), as the sources for the legal duty owed by defendant Steelworkers.
>
> A breach of contract is not in and of itself a tort. A contract may, however, create a situation which furnishes the occasion for a tort. When a person renders services to another pursuant to a contract or otherwise, the law imposes a duty of care in the performance of those services. "The duty of care arises . . . irrespective of contract," and "[t]here must be a breach of duty apart from the non-performance of a contract." *Taylor v. Herbold*, 94 Idaho 133, 484 P.2d 664 (1971). Mere failure to carry out contractual obligations cannot support a tort action while misfeasance in the performance of contract obligations may support a tort action.

> Plaintiffs complain the Union "failed to develop an adequate program for inspection and for safety, . . . failed to inspect," and "failed to require other safety devices to be used." Clearly the plainffs are upset with what the Union did not do, not with what it did do. Non-performance of alleged contractual duties will not sustain a tort claim.
>
> The "Good Samaritan Doctrine" is enunciated in RESTATEMENT (SECOND) OF TORTS §§ 323 and 324A. Section 324A reads:
>
> > One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for the physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if:
> >
> > (A) his failure to exercise reasonable care increases the risk of such harm, or
> >
> > (B) he has undertaken to perform a duty owed by the other to the third person, or
> >
> > (C) the harm is suffered because of reliance of the other or the third person upon the undertaking.
>
> Section 323 is substantially the same as 324A except it deals with the situation where an individual undertakes to render services directly to another person.
>
> We start with the premise there is no duty to be a good Samaritan. The law will only hold a defendant liable if the plaintiff can meet the criteria laid down by the RESTATEMENT. This Court has already held there is no proof the plaintiffs' decedents relied

on the Union's safety activities. Therefore, the third possible criteria, that the harm is suffered because of reliance of the third person upon the undertaking, is not satisfied. Neither has the first criteria, i.e., the failure to exercise reasonable care increased the risk of harm, been met.

In *Clemente v. United States*, 567 F.2d (1st Cir. 1978), the plaintiffs sued over the death of Roberto Clemente and two other passengers and crewmen in a private airplane crash. The plaintiffs alleged Federal Aviation Administration employees had acted negligently in failing to warn Clemente and other passengers the airplane was overweight and lacked a proper flight crew. The FAA had promulgated an internal order saying, "clear indication of alleged illegal flights should be made known to flight crew and persons chartering the service."

The appeals court held the defendant United States could not be held liable on the Good Samaritan theory.

> While the Federal Aviation Act empowered the administrative staff on the FAA to issue an order such as SO8430.20C, the Act itself does not require this conduct. The agency, in issuing the order, was acting entirely gratuitously and was under no obligation or duty to plaintiffs' decedents or any other passengers.
>
> [T]he *Restatement of Torts (Second)*, §§ 323 and 324a n makes it clear that liability in such a situation must be predicated on one of three grounds: the conduct of the employee actually increased the risk of harm to the damaged firm; the harm to the damaged firm resulted from his reliance on the employee carrying out the inspection as ordered; or there existed a prior duty to inspect owed by the employer to the damaged firm. . . . There was no underlying statutory

> duty to offer a special protection to plaintiffs' decedents; the failure to inspect *in no way added to the risk* of injury to the passengers or crew; and there is no evidence that anyone relied on the contents of SO8430.20C and limited their own safety precautions accordingly. (emphasis supplied).

Like *Clemente*, the Union's alleged failure to inspect, warn and make safe did not increase the danger to the miners beyond that under which they were operating. The Steelworkers may not have helped the miners' safety problems, but they did not augment them either. See also *Blessing v. United States*, 447 F. Supp. 1160 (E.D. Pa. 1978). The Court notes the case at bar is also akin to the *Clemente* case in that there is no evidence the rank-and-file Union members limited their own safety precautions because of Union activities.

Lastly, the defendant did not undertake to perform the safety functions owed by Sunshine Mine to the rank-and-file. The collective bargaining agreement clearly placed the responsibility for making the work place safe upon Sunshine Mine.

> The company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment. . . .
>
> . . . Advice of the safety committee, together with supporting suggestions, recommendations and reasons shall be submitted to the plant manager for his consideration and for such action as he may consider consistent *with the company's responsibility to provide for the safety and health of its employees* during the working hours of their employment and the mutual objectives set forth in section 1. (emphasis supplied).

> The collective bargaining agreement makes it very clear that the primary responsibility for the rank-and-file members' safety and health was placed upon the company as opposed to the Union which could only act in an advisory capacity. The Union could talk all it wanted to but when it came right down to it, the Union was without authority to force any safety and health measure upon the company except in highly limited, and for our purposes here, irrelevant circumstances. Herein lies the central factor in this dispute. The technical requirements of the RESTATEMENT aside, it is fundamentally unfair to hold a party liable for a condition it did not create or worsen and which it had no jurisdiction to correct. Summary judgment is granted dismissing all of plaintiffs' negligence claims.

The memorandum decision of the learned trial court is well-reasoned but proceeds from a faulty focus in several respects: First, the trial court embarks upon a lengthy analysis of whether the Miners' claim meets the requirements of Restatement of Torts (2d), Sections 323 and 324A, which he characterizes as the "Good Samaritan Doctrine." From there, the court reasons plaintiffs' cause fails because non-performance (as distinguished from misfeasance) will not support a tort action, the trial court stating:

> "Clearly, the plaintiffs are upset with what the Union did not do, not with what they did do."

Both premises are incorrect. The record establishes that the Union's safety undertaking was not the act of a "Good Samaritan" but was, in fact, a substantial part of the Union's offering in consideration of the workers' membership and payment of dues. The Colective Bargaining Agreement provided for the Union's safety inspection function, which service was bought and paid for by union dues. In any event, it provides an incorrect

focus to view and interpret Sections 323 and 324A under the rationale of the Good Samaritan Doctrine—the Restatement does not so characterize those sections and their specific language includes the rendering of services "for consideration." In this regard, the address of I.W. Abel, President of the U.S.W.A., in his November address to the delegates to the "International Conference of Safety and Health of the Steelworkers' (Appendix A hereto), is instructive. Moreover, the characterization of the Miners' claim as one for mere nonfeasance which did not increase the risk of harm is incorrect. As the analysis below will demonstrate, the Union, through its representatives, did embark upon safety inspections, and the issue is whether they negligently performed their undertaking, or whether the Union's negligent performance resulted in the men being subjected to increased hazards or potential for death on the date of the fire and explosion that would otherwise have been the situation had the inspections been performed without negligence.

As its second premise for its dismissal of the negligence cause the trial court opens:

> Lastly, the defendant [USWA] did not undertake to perform the safety functions owed by Sunshine Mine to the rank-and-file. The collective bargaining agreement clearly placed the responsibility for making the work place safe upon Sunshine mine.

However, a more detailed exposition below will demonstrate the Miners' cause is not premised on either a claim that the Union should perform management's safety functions or that the Union should make the workplace safe—rather, the cause of action is premised upon the Union negligently performing those safety functions which it did, in fact, undertake.

Recently, in Carroll v. United Steelworkers of America, 107 Idaho 717, 692 P.2d 361 (1984), this Court ruled that mere nonfeasance, even if it amounted to willful

neglect to perform a contract, is insufficient to establish duty in tort. In *Carroll*, a Union member accused his Union of failing to perform protective actions relative to conducting safety inspections at the work site, but did not allege negligent performance of those actions once undertaken. In *Carroll*, no inspections were made. In the instant case, by contrast, the safety committee did inspect the mine and the miners allege *not* that the Union members of the safety committee *failed* to inspect, but that they actually performed the duty of inspection in a negligent manner and failed to report what should have been obvious safety problems, the duty to report necessarily flowing from the act of inspection. Hence the instant case does not present a situation of non-feasance, but of malfeasance.

The Miners assert that the basis of a negligent undertaking is established in this case under *both* the collective bargaining agreement and the Constitution of the Union. The Constitution of the International Union and of the Local Union provided in pertinent part:

> Object . . . to establish through collective bargaining adequate wage standards, shorter hours of work, and improvements in the conditions of employment for workers and industry.
>
> . . .
>
> A safety and health committee under the direction of the International Union or its designated representative, shall be established in each Local Union.

At the time of the fire, there existed a collective bargaining agreement between the Union and the Sunshine Mining Company, dated March 11, 1970, which provided in Article 9, Section 1, the following:

> The Company and the Union will continue to operate toward the objective of eliminating accident and health hazards. The Company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their em-

> ployment. Protective devices, wearing apparel and other equipment necessary to protect employees from injury shall be provided by the Company in accordance with practices now prevailing in each separate department or as such practices may be improved from time to time by the Company.
>
> An employee who believes that he is being required to work under conditons [sic] which are unsafe beyond the nornmal [sic] hazards inherent in the operation in question, may request an immediate meeting with the shift boss, with or without consultation with his Assistant Grievance Committeeman. If, as a result of these actions, the employee still believes he is being required to work under conditions which are unsafe beyond the normal hazards inherent in the operation in question, a committee consisting of two (2) supervisory personnel and two (2) reliable employees, approved by the Union, shall inspect the operation in question within twenty-four (24) hours and shall decide what steps, if any, are necessary to correct the hazard.
>
> In the event the committee cannot agree, the employee involved may then file a grievance in Step 2 of the grievance procedure. It is understood and agreed that if a grievance is filed on an unsafe working condition, management and Union representatives shall give said grievance preferred handling, and shall expedite its movements through the grievance procedure.
>
> The employee may on request, be relieved from the job and be assigned to other work at the discretion of the Company. If an employee exrcises [sic] his rights under this section and the Company believes conditions are not beyond the normal hazards inherent in the operation in question, nothing contained in this section shall abridge the rights of the Company under other sections of this Agreement.

Neither shall the foregoing preclude the Company from assigning another employee to the job in question and it is further understood that no employee, other than communicating the facts, shall take any steps to prevent another from working on the job.

A Safety Committee consisting of three employees designated by the Union and three Management members designated by the Company shall be established. By mutual agreement, the committee may be increased to not more than six representatives for each party. The safety committee shall hold regular meetings at times determined by the committee. The function of the safety committee shall be to advise the Plant Manager concerning safety and health matters but not to handle grievances. In the discharge of its function the safety committee shall: Consider existing practices and rules relating to safety and health, formulate suggested changes in existing practices and rules, and recommend adoption of new practices and rules. Advice of the safety committee, together with supporting suggestions, recommendations and reasons shall be submitted to the Plant Manager for his consideration and for such action as he may consider consistent with the Company's responsibility to provide for the safety and health of its employees during the hours of their employment and the mutual objectives set forth in Section 1.

A Union member and a Management member of the safety committee may accompany the State Mine Inspector or his Deputy, on any inspection made at the property.

Two men shall be designated by the Union to accompany the Safety Engineer on the tours of the mine. Once each month, one of these two men, together with the Safety Engineer, shall make a tour of a section of the mine. The result of this tour shall

be considered at the following Union-Management safety committee meeting.

In the event a recommendation with respect to safety conditions that needs action immediately, concurred in by a majority of the entire committee, is not carried out, the Union may have recourse to the greivance [sic] procedure.

Affidavits established that a health and safety committee was formed. As a matter of practice within the Union, the committee members of the health and safety committee required by the constitution were also members of the joint safety committee recuired under the collective bargaining agreement. The Miners assert that since the inspections and recommendations regarding practices and rules were services to be performed by the Union for the benefit of its member miners, the Union had a duty to use due care in performing these services.

The Restatement (Second) of Torts, § 323 (1977) states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm.
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

The Miners assert that evidence was presented to establish the following:

(1) John Rawson, Glen Rossiter, Wayne Johnson and Don Wood did not have the use of self-rescuers (oxygen masks and cannisters);

(2) Self-rescuers were stored in boxes with padlocks;

(3) Some of the self-rescuers were eighteen years of age and were corroded so that the valve could not be turned to operate them;

(4) Some of the self-rescuers were inoperative and others were used by miners who sensed them getting hot and discarded them not knowing that the development of heat was an indication that the self-rescuer was working;

(5) The miners did not know how to use self-rescuers that may have been available and had not been trained in their use;

(6) No self-rescuers were stored at the 5,400 level where John Rawson and Glen Rossiter were stationed; at other levels there were fewer cannisters than the usual number of men working at those levels; and that there were only six units at the major escape route at the 3,100 foot level.

(7) There were no periodic fire drills or evacuation drills for miners working underground;

(8) There were no opportunities for the miners under controlled circumstances to become familiar with proper exit procedures and sequences; and

(9) There were no periodic checks or tests made of a stench warning system and many of the survivers testified to facts permitting the inference that the system did not work.

(10) Evidence exists that the fire was started by spontaneous combustion in a pile of accumulated rubbish.

The Miners contend that most of these deficiencies could have been observed, and should have been observed, in the course of a reasonable inspection and, further, that recommendations could have, and should have, been made with regard to these deficiencies. A reasonable in-

ference which the trial court should have drawn in favor of the miners is that the inspecting personnel were negligent in not seeing and reporting some of those conditions. We cannot say as a matter of law that had the inspectors reported these blatant violations to the committee, with the committee in turn reporting them to management, that management would have corrected these defects—but neither was the trial court correct on summary judgment to resolve that factual issue the other way. Rather, such is an issue of proximate cause not properly resolved on summary judgment. The record is devoid of any opposing affidavits or deposition testimony that the inspections were, in fact, conducted in a reasonable and prudent manner in accordance with recognized standards.

Construing the facts and the inferences most favorably toward the parties against whom summary judgment is sought, and absent a record establishing that management had no concern for safety, the reasonable inference would be that management would have acted responsibly had these matters been brought to its attention.

In light of the above record, we cannot conclude as a matter of law that the Union owed no duty to exercise due care in performance of the inspections once its personnel undertook them. Moreover, we cannot conclude as a matter of law that the Union owed no duty to bring to the attention of the members of the safety committee the safety problems that existed in the Sunshine Mine. Because the Union, pursuant to the provisions of the collective bargaining agreement, had contracted to inspect and *in fact, inspected* the mine, it owed the (minimal) duty to its members to exercise due care in inspecting and in reporting the findings of its inspection. For this reason, we reserve the trial court's order granting the Union's motion for summary judgment of dismissal as to the negligence claims.

III. THE PREEMPTION ISSUE

In Dunbar v. United Steelworkers of America, 100 Idaho 523, 602 P.2d 21 (1979), which case arose out of the same facts as the instant appeal, this Court held on remand that material issues remained regarding whether the Union had a duty to inspect and whether it breached that duty. In *Dunbar*, the question of the existence of a duty was never reached since the trial court held that the cause of action was preempted by the federal duty of fair representation. Justice Bakes, specially concurring in Part 1 of *Dunbar*, wrote:

> I concur with the majority's ruling that the trial court erred in dismissing the appellants' wrongful death action against respondent United Steelworkers because of the preemption doctrine. An action for wrongful death is a creature of our state statutes, is of substantial local interest, and traditionally has been committed to the jurisdiction of the courts of the state. Moreover, this action for wrongful death is unlikely to present the identical legal issues as a proceeding under the federal labor laws arising from this same factual setting. Assertion of jurisdiction by the courts of this state over the appellants' action would appear to present no significant risk of undue interference with national labor policy. 100 Idaho at 546-547; 602 P.2d at 44-45.

No provision of the National Labor Relations Act provides that it is federal policy to immunize labor unions from responding in tort for their negligent acts. In Brown v. Hotel & Restaurant Employees & Bartenders, 468 U.S. ——, 104 S.Ct. 3179, 82 L.Ed.2d 373 (1984) the court noted:

> The National Labor Relations Act . . . leaves much to the state, though congress has refrained from telling us how much.

The Union argues that *all* relationships between a union and its members flowing from the collective bargaining agreement are preempted, with the union's duty being only that of "fair representation." This leads to some rather fuzzy analysis. "Preempt" is defined as "to seize upon to the exclusion of others," Webster 3d Int'l Dictionary. Although the NLRB has been given exclusive jurisdiction to regulate and interpret collective bargaining agreements as to ongoing performance and modification, the NLRB has not been given (nor has it seized) the function of considering tort damages for wrongful death for past union misfeasance. We remain of the view expressed by the majority of this court in *Dunbar*, 100 Idaho at 527.

> We are cited to no authority, for example, which insulates a union for its negligent and tortious conduct toward one of its members, i.e., if a member of a union was struck by a motor vehicle owned by the union and operated by one of its officials during the course of his employment for the union, we cannot believe the union would be insulated from liability on the basis that the only duty it owed toward its members was that of fair representation. If a union's unreasonable conduct results in the death of one of its members, it should not be excused from liability because of the legal fortuity of its organizational status anymore than if its conduct brought death to a nonunion member.

Recently in Allis-Chalmers Corp., Petitioner v. Roderick S. Lueck, 53 USLW 4463 (April 16, 1985) the United States Supreme Court held that when resolution of a state-law claim is substantially dependent upon analysis of the terms of a collective bargaining agreement, that claim must either be treated as a § 301 claim or dismissed as preempted by federal labor-contract law. In *Allis-Chalmers*, the United States Supreme Court reversed a Wisconsin Supreme Court decision which had

held that a claim that a Union had handled an insurance claim in bad faith was not pre-empted because under Wisconsin law the tort of bad faith is distinguishable from a bad-faith breach-of-contract claim, and that although a breach of duty is imposed as a consequence of the relationship established by contract, it is independent from that contract. In reversing the Wisconsin decision, the United States Supreme Court concluded that the right asserted by the Union member was rooted in contract, and the bad-faith claim could have been pleaded as a contract claim under § 301. The Court concluded that unless federal law governed that claim, the meaning of the disability-benefit provisions of the collective bargaining agreement would be subject to varying interpretations, and the congressional goal of a unified body of labor-contract law would be subverted. The *Allis-Chalmers* Court stated, "Because the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, any attempt to assess liability here inevitably will involve contract interpretation. . . . These questions of contract interpretation, therefore, underlie any finding of tort liability, regardless of the fact that the state court may choose to define the tort as 'independent' of any contract question. Congress has mandated that federal law govern the meaning given contract terms. Since the state tort purports to give life to these terms in a different environment, it is preempted." 53 USLW at 4467. In the instant case, however, we need not interpret a contract. The appellants are suing for breach of a duty to inspect and report under the reasonable and prudent person standard.

Both the Union, on appeal, and the trial court, in its memorandum decision, urge this Court to reconsider its holding in *Dunbar*. The trial court stated:

> This case does not involve a collective bargaining agreement whereby the Union assumed management safety responsibilities and therefore management's

> common law duties. In Helton v. Hake, 564 S.W.2d 313 (Mo. 1978), the collective bargaining agreement provided the Union steward would ensure no work was done in the immediate area of high tension lines. The agreement distinctly said the employer was in no way responsible for the performance of these safety functions by the steward.
>
> . . .
>
> . . . When the Union takes actual authority for enforcing safety conditions on the work site away from management, it should be held responsible for breaches in a duty of care just as management would have been at common law. The defendant Union's collective bargaining agreement with Sunshine did not allow the Union to enforce safety measures. The Sunshine/Steelworkers' contract did say the Union "shall inspect," but the Union could do nothing but advise once it had been reported.

While the trial court concluded that *Helton* supported the Union's position, in fact it supports that of the Miners. In *Helton*, the Missouri court stated:

> The complaint alleges that the union, through its agent, the steward, negligently and carelessly failed to enforce the safety rule relating to work in the area of high tension power lines. The suit is clearly brought as an action in tort seeking recovery for wrongful death due to the alleged negligence of the defendants. The only relevance of the collective bargaining agreement appears to be that it would determine, to some extent at least, the nature and scope of defendants' duty. 564 S.W.2d at 318.

Likewise, in the instant case, the provisions of the collective bargaining agreement do not require interpretation, as was the case in *Allis-Chalmers*, *supra*, but rather the provisions determine only the nature and scope of the Union's duty. The trial court acknowledges that the

Union had a duty to "advise;" and it is *that* duty which appellants contend was breached. Whether the Union breached the duty, and whether such breach, if established, was the actual or proximate cause of the appellants' decedents' deaths, are not issues addressed by this appeal. Our narrow holding today is that the Union, having inspected, assumed a duty to use due care in inspecting and, from the duty to use due care in inspecting arose further duty to advise the committee of any safety problems the inspection revealed. Moreover, since an action for wrongful death is a creature of our Idaho statute, is of substantial local interest, and traditionally has been committed to the jurisdiction of the courts of the state, and because the instant action does not require an interpretation of the terms of the collective bargaining agreement, we do not consider it to be preempted by federal law.

In Hechler v. Intern. Broth. of Elec. Workers, AFL-CIO, 772 F.2d 788 (11th Cir. 1985) the court correctly analyzed the non-applicability of the preemption doctrine to cases of this nature.[1]

In *Hechler*, the court the employee's state law action does not run afoul of the recent pronouncement in Allis-Chalmers Corp. v. Lueck, in which the Court found preempted a state action for bad-faith handling of an insurance claim arising out of a disability insurance plan included in a collective bargaining agreement. The tort

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[1] The *Hechler* court blinked and waffled shamefully by its final qualifying paragraph:

> We emphasize at this point the narrow scope of our holding. . . . This case is distinguishable from [earlier cases] in which the plaintiff sought relief from the union for a breach of its general duty to inspect for safety and for the benefit of the entire work force in the work place pursuant to the collective bargaining agreement. In [this] case, the plaintiff alleges a duty running from the union to her individually that required [it] to assure that she was first qualified to work in a dangerous electrical substation on the job assigned to her prior to her assignment. 772 F.2d at 797-798.

in that case was essentially a product of the labor contract itself—without the contract, no tort claim could have existed. In this case, the claim is essentially one of common law negligence for breach of a duty of care. Liability will turn on basic negligence principles as developed by state law.

A union breaches its duty of fair representation only when it treats an individual in an arbitrary, discriminatory, or bad faith manner. Vaca v. Sipes, 386 U.S. 171 (1967). Two key issues must be addressed to determine whether a common law negligence action is preempted by the federal remedy for breach of such a duty.

> *First*, a court must determine whether the duty the union allegedly breached is so inextricably intertwined with the collective bargaining agreement that only a duty of fair representation claim is available. *Second*, in making this determination, the court must be aware of federal labor law policy and whether a negligence action against a union impermissibly impedes upon the federal labor-management regulatory scheme.
>
> With regard to the later concern, the primary inquiry is whether the duty sought to be enforced against the union . . . is so tangential . . . to the federal scheme that the [action] is properly exempted from the [general] preemption rule. [B]alancing of the relevant factors leads [to a conclusion] that [the employee's] negligence claim is not preempted. *Hechler*, 772 F.2d at 796.

The union's duty of fair representation does not displace those duties created by state law that prohibit a person or corporation from engaging in tortious conduct resulting in death or injury.

> [N]othing in the [federal] statutory scheme expressly addresses such conduct or provides a mechanism for its redress. Likewise, it cannot be said that by failing expressly to [address] acts of negli-

gence by unions, Congress intended to permit unions to engage in such acts free of the scrutiny of state courts. *Hechler*, 772 F.2d at 796-97.

> Nor is the union's contractual duty to assure worker training . . . inextricably intertwined with its federal duty of providing fair representation. . . . [T]he fact that . . . reference to a collective bargaining agreement must be made in order to define the scope of the . . . duty does not [mean that a negligence action is] no more than a [preempted] § 301 action.
>
> [E]ven if the state action threatens adjudication of matter cognizable by the [National Labor Relations] [B]oard or by a court adjudicating federal labor law, the extent of that threat [must be balanced] against the importance of the action to the state. [N]o impermissible conflict . . . [e]xists in this case. *Hechler*, 772 F.2d at 797.

We agree with the *Hechler* analysis. Counsel for the union advises that the Supreme Court of the United States entered an order on May 19, 1986, granting review of *Hechler* and urged that if we reverse and remand, we should, in the interest of judicial economy, direct stay of proceedings until the Supreme Court acts. Since this cause of action arose fourteen years ago, and since the parties have not had a hearing on the merits of such a proposal, we decline to direct a stay without prejudice to the right of either party to assert the request before the trial court.

Affirmed as to the fraud claim, reversed as to the negligence claim and remanded to the trial court for further proceedings consistent with this opinion.

Costs to appellants. No attorney fees.

BISTLINE, J. concurs.

DONALDSON, C.J. concurs in the result.

SHEPARD, J. dissenting.

I concur in Part I of the majority opinion wherein it affirms the trial court's issuance of summary judgment relating to the fraud claim. I also concur in Part III of the majority opinion wherein it holds that the instant action is not preempted by federal law. I dissent from Part II of the majority opinion wherein it reverses the trial court's issuance of summary judgment on the negligence claim.

Less than two years ago this Court, with only Bistline, J. dissenting, affirmed a summary judgment granted to the United Steelworkers of America as defendant in an identical case. In *Carroll*, plaintiff was a mine worker in the same mining district as that in the instant case. In *Carroll* the same collective bargaining agreement existed between the same union and a company employer. Carroll was injured while working in the mine. Carroll was a member and brought action against the United Steel Workers of America. In *Carroll*, as here, it was asserted that the union owed a duty to Carroll since Carroll was the third-party beneficiary of the contract between the union and the employer.

I find the facts and the holding of *Carroll* indistinguishable from the present case. In *Carroll* the Court stated:

> "Under Idaho law it is settled that an alleged failure to perform a contractual obligation is not actionable in tort. . . . Mere nonfeasance, even if it amounts to a willful neglect to perform the contract, is insufficient to establish a duty in tort. . . . Consequently, Carroll's cause of action, if any, arising from the Collective Bargaining Agreement lies only in contract, not in tort."

In support of that holding, the *Carroll* Court discussed House v. Mine Safety Appliances Company, 417 F.Supp. 939 (1976), stating:

> "Judge Anderson, in dicta, discussed public policy considerations which relate to the issue of imposing tort liability on the basis of a collective bargaining agreement. . . . To impose liability on the union in a case such as this is against public policy and would seriously disrupt labor relations policy."

Bistline, J. dissented in *Carroll*, and his position in the instant case is consistent. I cannot, however, fathom the reasoning of the two members of the Court. If *Carroll* was wrong, it should be overruled. I view as sophistry any attempt to distinguish *Carroll* on the basis that *Carroll* involved a total failure of duty, while the instant case involves only a partial failure of duty. If such be a distinction, it is merely one without a difference.

Lastly, it is to be noted that the defendant United Steelworkers of America, is an unincorporated association. Plaintiff is a member of that unincorporated association. Presumably the union has no existence, corporate to otherwise, separate and apart from its members, and does not constitute a separate entity. The question of how the plaintiff, along with others as members of a nonincorporated association, can owe a duty to himself is not discussed, nor the implications of a breach of that duty which presumably plaintiff, along with others, had an alleged obligation to perform.

BAKES, J., dissenting:

For the reasons set out below, I would affirm the decision of the district court granting summary judgment in favor of the respondent United Steelworkers of America.

I

I believe that this action is preempted by federal law. When this case was before this Court previously in Dunbar et al. v. United Steelworkers of America et al., 100 Idaho 523, 602 P.2d 21 (1979), I then wrote that the

preemption issue should not be decided on a motion to dismiss, as had been in that case, but that it should "await a full factual development of the legal issues raised under our state tort law." After the Court in *Dunbar* remanded the case to the district court for further proceedings, extensive discovery was conducted, resulting in a more complete factual evaluation of the plaintiffs' claims. Also, in the interim the United States Supreme Court had again spoken, I believe definitively, in the case of Allis Chalmers Corp. v. Lueck, —— U.S. ——, 105 S.Ct. 1904 (1985). Based upon that record, I now believe that federal law requires us to affirm the decision of the district court.

In Allis Chalmers Corp. v. Lueck, *supra*, the Supreme Court determined that Section 301(a) of the Labor Management Relations Act of 1947, 27 U.S.C. § 185(a), requires state courts to apply federal laws when resolving a state tort claim which is substantially dependent upon analysis of the terms of the collective bargaining agreement. In order to understand the Court's decision in *Allis Chalmers*, it is necessary to understand Section 301(a) of the Labor Management Relations Act of 1947.

Section 301(a) states:

> "Suits for violation of contracts between an employer and the labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a).

Although on its face Section 301(a) simply gives the federal district courts jurisdiction over suits for violation of certain specified types of contracts, the statute's import has been extensively analyzed by the United States Supreme Court. In Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 82 S.Ct. 519 (1962), the Court recognized that in enacting Section 301(a) Congress intended that both state and federal courts have concurrent

jurisdiction over contracts made by labor organizations. In exercising this concurrent jurisdiction, the federal courts are authorized to fashion a body of federal law for the enforcement of such agreements. Textile Workers v. Lincoln Mills, 353 U.S. 448, 457, 77 S.Ct. 912, 918 (1957). The application of state law is preempted because uniformity in this area of the law is particularly important since,

> "The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes." Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-04, 82 S.Ct. 571, 577 (1962) (footnote omitted).

Thus, "[i]n enacting Section 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." Teamsters v. Lucas Flour, 369 U.S. at 104, 82 S.Ct. at 577 (1962).

Section 301 preemption, which gives the state concurrent jurisdiction but mandates that the state courts apply federal substantive law, is distinct from the sort

of preemption discussed in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773 (1959), and its progeny. *Garmon* preemption is concerned with protecting the primary jurisdiction of the National Labor Relations Board. San Diego Building Trades Council v. Garmon, *supra*. *See also* Allis Chalmers Corp. v. Lueck, —— U.S. ——, ——, 105 S.Ct. 1904, 1912-13, n. 9 (1985); Brown v. Hotel & Restaurant Employees & Bartenders, —— U.S. ——, ——, 104 S.Ct. 3179, 3186 (1985). Section 301 preemption does not stem from concern for the National Labor Relations Board's primary jurisdiction. Rather, Section 301 preemption reflects Congress's concern that collective bargaining agreements be interpreted under a uniform federal labor law.

Stressing this need for uniformity, the Court in the recent *Allis Chalmers* decision extended the preemptive effect of Section 301 beyond suits merely alleging contract violations. The court stated:

> "Questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, *whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.* Any other result would elevate form over substance and allow parties to evade the requirements of Section 301 by relabeling their contract claims as claims for tortious breach of contract." Allis Chalmers v. Lueck, —— U.S. at ——, 105 S.Ct. at ——. (Emphasis added.)

The Court's extension of Section 301 is not surprising given the close relationship between contract actions and tort actions arising out of contract. *See generally* Prosser & Keeton, The Law of Torts, §§ 92, 93 (1984).

In determining whether Section 301(a) applies to a tort claim, the focus is on "whether evaluation of the

tort claim is inextricably intertwined with consideration of the terms of the labor contract. If the state's tort law purports to define the meaning of the contract relationship, that law is preempted." Allis Chalmers v. Lueck, —— U.S. at ——, 105 S.Ct. at 1912. The characterization of an action as a tort action is not sufficient to avoid preemption under Section 301(a).

Application of the preemption test articulated in *Allis Chalmers* to the facts of the wrongful death action now before this Court is complicated by limiting language[1] in *Allis Chalmers*. However, considering the specific facts set forth in *Allis Chalmers*, I can find no basis for distinguishing *Allis Chalmers* from the case at bar.

In *Allis Chalmers*, the Wisconsin Supreme Court had determined that the plaintiff's action for bad faith handling of an insurance claim, arising from a claim made under a disability plan included in a collective bargainign agreement, was not preempted. The Wisconsin court's conclusion was based upon application of the balancing test enunciated in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244, 245, 79 S.Ct. 773, —— (1959). Using the *Garmon* analysis, the Wisconsin court held that the administration of disability claim

[1] In Allis Chalmers v. Lueck, —— U.S. ——, 105 S.Ct. 1904 (1985), the Court noted: "It is perhaps worth emphasizing the narrow focus of the conclusion we reach today. We pass no judgment on whether the suit also would have been preempted by other federal laws governing employment or benefit plans. Nor do we hold that every state lawsuit asserting a right that relates in some way to a provision in a collective bargaining agreement, or more generally to the parties to such an agreement, necessarily is preempted by Section 301. The full scope of the preemptive effect of federal labor contract law remains to be fleshed out on a case by case basis. We do hold that when resolution of a state law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a Section 301 claim, *see* Avco Corp. v. Aero Lodge 735, 390 U.S. 557 (1968), or dismissed as preempted by federal labor contract law."

procedures under collective bargaining agreements was only of peripheral concern to federal labor law, but that the bad faith insurance tort was of substantial significance to the State of Wisconsin. This analysis was rejected by the Supreme Court. The Court stated:

> "So called *Garmon* preemption involves protecting the primary jurisdiction of the NLRB, and requires a balancing of state and federal interests. The present tort suit would allow the state to provide a rule of decision where Congress has mandated that federal law should govern. In this situation, the balancing of state and federal interests required by *Garmon* preemption is irrelevant, since Congress, acting within its power under the commerce clause, has provided that federal law must prevail." Allis Chalmers v. Lueck, —— U.S. ——, n. 9.

The *Garmon*-type analysis is simply not applicable if the asserted claim is "inextricably intertwined with consideration of the terms of the labor contract." If the asserted claim is "inextricably intertwined with consideration of the terms of the labor contract," Section 301 mandates that federal substantive law be applied.

In our prior decision in Dunbar v. United Steelworkers of America, 100 Idaho 523, 602 P.2d 21 (1979), which was decided prior to *Allis Chalmers*, the Court addressed only the question of whether this action is preempted because it would infringe upon the primary jurisdiction of the National Labor Relations Board. The Court today continues to adhere to the views expressed in *Dunbar* insofar as the *Garmon* preemption analysis may be applied to claims unrelated to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from that agreement. However, in *Dunbar* we did not consider whether the Section 301 preemption of *Allis Chalmers*, which requires that our state courts apply uniform federal law, applies in this wrong-

ful death action. If this wrongful death action is "inextricably intertwined with consideration of the terms of the labor contract," as was the bad faith tort alleged in *Allis Chalmers*, we must apply federal substantive law as mandated by Section 301(a).

Having fully considered the record, I conclude that Section 301(a) applies here. Any duty which the union owed to its members, and which might form the basis of the plaintiffs' negligence claims, arose through the terms of the collective bargaining agreement. It was the collective bargaining agreement which provided for the formation and membership of the Safety Committee and set forth the duties of the Safety Committee. Whether the terms of the collective bargaining agreement imposed a duty on the union or merely gave the union the right to participate in the selection of the safety committee is a question "inextricably intertwined with consideration of the terms of the labor contract."

The majority's attempt to characterize the duty that the union owed to its members as arising from the union's constitution and the actions of the union's officers toward its members are unpersuasive. Through the negotiation process, the union and the company worked out the collective bargaining agreement which not only outlined the union's responsibilities in regard to the Safety Committee, but also limited the union's right to interfere in the operation of the mine. Any duty which the union had to its members to preserve safe conditions within the mine could only be fulfilled through the terms of the collective bargaining agreement. Thus, because consideration of issues related to the union's duty is inextricably intertwined with consideration of the collective bargaining agreement, we cannot ignore the Supreme Court's mandate. The plaintiffs' negligence claim must be treated as a Section 301 claim, and federal law applied.

A survey of federal law indicates that the only duty which the union owes to its members under federal law

is the duty of fair representation.[2] The duty of fair representation is breached only when the conduct of the union is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 190, ——, 87 S.Ct. 903, 916 (1967); Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363 (1964). Due care has not been incorporated into the union's duty of fair representation. Mere negligence does not generally constitute a breach of the union's duty of fair representation. Condon v. Local 2944, United Steelworkers, 683 F.2d 590 (1st Cir. 1982). Dente v. International Organization of Masters, Mates & Pilots, Local 90, 492 F.2d 10 (9th Cir. 1973). Since the plaintiffs here have not alleged that the union's conduct was arbitrary, discrimitory, or in bad faith, the appellants have not made out a cause of action. Accordingly, the district court was correct in granting the union's motion for summary judgment with respect to the negligence issues.[3]

II

Even if state tort law, rather than federal law, applied, the majority's analysis of the negligence issues under state tort law and its effort to distinguish our recent case of Carroll v. United Steelworkers of America,

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[2] In Carroll v. United Steelworkers of America, 107 Idaho 717, 692 P.2d 361 (1984), we recognized that other duties may arise under state law. Quoting from Dunbar v. United Steelworkers of America, 100 Idaho 523, 602 P.2d 21 (1979), we reiterated the view that there is

> "no authority . . . which insulates a union for its negligence and tortious conduct toward one of its members, *i.e.*, if a member of a union was struck by a motor vehicle owned by the union and operated by one of its officials during the course of his employment with the union, we cannot believe the union would be insulated from liability on the basis that the only duty it owed toward its members was that of fair representation."

[3] Where an order of a lower court is correct, albeit based on a different theory than that found to be dispositive by the Supreme Court, the lower court order will be affirmed. Sheppard v. Sheppard, 104 Idaho 1, 7, 655 P.2d 895, —— (1982).

107 Idaho 717, 692 P.2d 361 (1984), is difficult to comprehend. That case involved a substantially similar contract and substantially similar facts. The majority attempts to distinguish this case from *Carroll* stating that in *Carroll* the safety committee failed to perform protective actions, but that

> "in the instant case, by contrast, the safety committee did inspect the mine and the miners allege *not* that the Union members of the safety committee failed to inspect but that they actually performed the duty of inspection in a negligent manner and failed to report what should have been obvious safety problems, the duty to report necessarily flowing from the act of inspection. Hence, the instant case does not present a situation of non-feasance but one of malfeasance."

Without stating it, the majority is applying a *respondeat superior* doctrine to the union for the alleged malfeasance of a safety committee, only some members of which they had the responsibility of appointing. The majority has failed to recognize that the union, and the safety committee which failed to inspect or inspected in a negligent manner, are not one and the same. Rather, under the collective bargaining agreement, as the majority points out, the union was to appoint three members of the safety committee, and management was to appoint three members of the committee. For all that this record shows, the union did perform its contractual obligation and did appoint its members to the safety committee, as did management. However, the safety committee was not the *alter ego* of the union, nor is there anything in the record from which a triable issue of fact arises concerning whether or not the union had a right to direct the manner in which the safety committee carried out its inspections. The majority opinion merely assumes that any negligence of the safety committee, which was composed of both management and union designees, was, perforce,

misconduct of the union and thus actionable. The majority assumes *respondeat superior* liability on behalf of the union for an organization which the record does not reflect it had any authority to control. This is clearly reflected in its opinion, *ante* at 15, when it states, "In light of the above record, we cannot conclude as a matter of law that the Union owed no duty to exercise due care in performance of the inspections once its personnel undertook them." However, those personnel were members of a committee composed of both management and labor representatives. The majority does not even discuss, much less support in the record and by authorities, the proposition thta the union, which appointed representatives to the safety committee pursuant to provisions of the collective bargaining agreement, would then be responsible if one of its appointees did not exercise due care in performing the safety committee's inspection function. The appellants have not pointed out any such facts or law to support *respondeat superior* liability under those circumstances and, accordingly, the district court's judgment should be affirmed on that issue.

Furthermore, the majority opinion states, *ante* at 15, "Moreover, we cannot conclude as a matter of law that the Union owed no duty to bring to the attention of the members of the safety committee the safety problems that existed in the Sunshine Mine." However, there is nothing in the record to suggest that, apart from the knowledge gained by those appointees to the safety committee who may have conducted inspections, the "union" ever had any knowledge of safety problems that existed in the Sunshine Mine.

Finally, the majority states, *ante* at 15, that "[b]ecause the Union, pursuant to the provisions of the collective bargaining agreement, had contracted to inspect and, in fact inspected the mine, it owed the (minimal) duty to its members to exercise due care in inspecting and in reporting the findings of its inspection." Again, the

collective bargaining agreement did not impose upon the union a duty to inspect the mine, but merely to appoint representatives to the safety committee who, along with the management representatives, would inspect the mine. The union carried out its responsibility under the collective bargaining agreement by appointing the members. However, assuming that the appointees negligently carried out their responsibilities, there is no showing in fact or law that the union is responsible for their conduct under a *respondeat superior* theory. The majority is plainly incorrect when it concludes that, under the provisions of the collective bargaining agreement, the union "had contracted to inspect and, in fact inspected the mine . . ." Accordingly, I believe the summary judgment granted by trial court should be affirmed.

APPENDIX C

1986 Opinion No. 30

IN THE SUPREME COURT
OF THE STATE OF IDAHO

Boise, April 1985 Term

Filed: February 24, 1986

Frederick C. Lyon, Clerk

No. 15338

THARON RAWSON, individually and as Guardian ad Litem for her minor children, SETH RAWSON and CINDY RAWSON, heirs of JOHN RAWSON, deceased,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorportaed association,
Defendant-Respondent.

BERNIECE JOHNSON, individually and as Guardian ad Litem for MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON and JOHN RUSSELL JOHNSON,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

LAURA DUNBAR, as Guardian ad Litem for RICKINA ROSSITER and GLEN RAYMOND ROSSITER, JR., minor heirs of GLEN RAYMOND ROSSITER,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

MARY WOOD, as Guardian ad Litem for LESLIE D. WOOD, her minor child, heir of DON B. WOOD, deceased,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone. Honorable Watt E. Prather, District Judge.

Appeal from an order granting summary judgment to the United Steelworkers of America in an action for wrongful death. *Affirmed.*

Kenneth B. Howard, Jr., Coeur d'Alene, Idaho; Lloyd J. Webb, Twin Falls, Idaho; Bruce O. Robinson, Bonners Ferry, Idaho; and Robert J. Cartwright, San Francisco, California, attorneys for appellants.

Wayne P. Fuller, Caldwell, Idaho; George H. Cohen, Washington, D.C.; and Frederick V. Betts, Seattle, Washington, attorneys for respondent.

SHEPARD, J.

This is an appeal from a summary judgment in favor of United Steelworkers of America (U.S.W.A.) in an action brought on behalf of the minor children and heirs of four deceased mine workers who died in the 1972 Sunshine Mine fire disaster at Kellogg, Idaho. *See* Dunbar v. United Steelworkers of America, 100 Idaho 523, 602 P.2d 21 (1979), *cert. denied*, 446 U.S. 983 (1980). The instant action was brought on theories of negligence and fraud.

The well reasoned opinion of the trial court ordered dismissal of platintiffs-appellants' fraud claims on the basis that they rested on their pleadings and did not present affidavits or other evidence in response to the evidence submitted by U.S.W.A. We affirm. The trial court in its opinion also ordered dismissal of plaintiffs-appellants' negligence claim on the basis that no duty on the part of U.S.W.A. had been established, the breach of which had caused the damage. We affirm. The trial court, in its memorandum opinion, also suggested this Court re-examine its decision in *Dunbar, supra*, as to whether the claims of plaintiffs-appellants are preempted under federal labor law. We decline the invitation since that issue is not necessary to the decision in the instant case.

I. THE FRAUD CLAIM

Plaintiffs-appellants' complaints allege that the U.S.W.A. made representations to its members who were workers at the Sunshine Mine, that the representations were false, that they were relied upon by the employees, and that they were the proximate cause of decedent's death. Those alleged representations were:

A. That it was a competent organization for protecting the welfare, safety and interest of its members, and had concern for said welfare, safety and interest of its members.

B. That it has a reliable degree of expertise in underground mining.

C. That it would develop adequate programs for safety through its union representatives for the benefit of its members, the rank-and-file of said union.

D. That it would provide competent union representatives to participate in the inspections of the mine for safety and accident prevention.

E. That it would enforce the provisions of the union contract with the Sunshine Mine as it related to the safety and accident prevention.

There is no specificity as to whether the alleged fraud was actual or constructive. In an action alleging actual fraud, the claimant must prove that the other party acted with an intent to deceive. Sorenson v. Adams, 98 Idaho 708, 571 P.2d 769 (1977). In case of constructive fraud the element of intent to deceive is not required. State v. Hightower, 101 Idaho 749, 620 P.2d 783 (1980); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); McGhee v. McGhee, 82 Idaho 367, 353 P.2d 760 (1960). A party alleging fraudulent misrepresentation must prove each of the following elements: a representation; its falsity; its materiality; the speaker's knowledge of its falsity or ignorance of its truth; the speaker's intent that it should be acted on and in the manner reasonably contemplated; the hearer's ignorance of its falsity, reliance on its truth, right to rely thereon, and consequent and proximate injury. Smith v. King, 100 Idaho 331, 597 P.2d 217 (1979).

Summary judgment should be granted only when the pleadings, depositions and admissions, together with affidavits, if any, show that there is no genuine issue of any material fact. The facts are to be liberally construed in favor of the party opposing the motion which is also given the benefit of all reasonable inferences which might

be reasonably drawn from the evidence. Anderson v. Ethington, 103 Idaho 658, 651 P.2d 923 (1982).

Here, the U.S.W.A. submitted evidence establishing that it did not represent to the miners that it had expertise in mine safety or that it could insure a safe work place. Plaintiffs-appellants failed to present any evidence by way of affidavit or otherwise which contradicted the assertions of the U.S.W.A. When a motion for summary judgment is made and supported by affidavit, an opposing party may not rest upon its pleadings, but must respond by affidavit, deposition or interrogatories setting forth specific facts showing a genuine issue of fact. First Piedmont Bank and Trust Co. v. Doyle, 97 Idaho 700, 551 P.2d 1336 (1976); I.R.C.P. 56(e).

Since plaintiffs-appellants relied only upon their pleadings and produced no evidence by way of affidavit or otherwise, there is no showing of any genuine issue of material fact regarding the fraud allegations, and the trial court was therefore correct in granting the motion for summary judgment on the fraud claim.

II. THE NEGLIGENCE CLAIM

At the time of the fire there existed a collective bargaining agreement between U.S.W.A. and the Sunshine Mining Company which made provisions for the safety of workers in the mine. It is asserted by plaintiffs-appellants that from such collective bargaining agreement and/or the constitution of the U.S.W.A., there arose a duty on the U.S.W.A. regarding the safety of its members employed at the Sunshine Mine. It is asserted by plaintiffs-appellants that the duty imposed upon U.S.W.A. by those documents was breached in that the decedents did not have the use of self-rescuers; that some of the self-rescuers were inoperative because of age; that self-rescuers were stored in locked boxes; that the mine workers had not been trained and did not know how to use self-rescuers; that at certain levels no self-rescuers

were stored or they were too few in number for the number of workers; that there were no periodic fire drills or evacuation drills; that a stench warning system had not been tested and did not work, and that the mine workers had not been made familiar with proper exit procedures.

We hold that the instant case is indistinguishable from this Court's recent opinion in Carroll v. United Steelworkers of America, 107 Idaho 717, 692 P.2d 361 (1984). In *Carroll* plaintiff was a mine worker in a different mine, but in the same mining district as were decedents in the instant case. In *Carroll* a collective bargaining agreement existed between the union and the company employer, and, as here, Carroll was injured while working in the mine. Carroll was a member of, and brought action against, the United Steelworkers of America, asserting that the union had been negligent in carrying out its duty which the union had undertaken under the terms of the collective bargaining agreement with the employer.

In *Carroll*, the opinion of the majority was authored by Huntley, J., and held that summary judgment granted to United Steelworkers was affirmed since,

> "Under Idaho law, it is settled that an alleged failure to perform a contractual obligation is not actionable in tort. . . . Mere nonfeasance, even if it amounts to a willful neglect to perform the contract, is insufficient to establish a duty in tort. . . . Consequently, Carroll's cause of action, if any, arising from the Collective Bargaining Agreement lies only in contract, not in tort." 107 Idaho at 719, 692 P.2d at 363.

Hence we hold that the trial court was correct, and its summary judgment of dismissal of plaintiffs-appellants negligence claim is affirmed.

III.

As above-noted, the trial court, in its opinion, invited this Court to review its holding in Dunbar v. United Steelworkers of America, 100 Idaho 523, 602 P.2d 21 (1979), *cert. denied*, 446 U.S. 983 (1980), wherein this Court dealt with the issue of federal preemption of the field under the National Labor Relations Act. Although perhaps not necessary to this decision, we affirm our holding in *Dunbar*. U.S.W.A. argues that all relationships between a union and its members resulting from a collective bargaining agreement, are preempted, with the union's duty being only that of "fair representation." Although the N.L.R.B. has been given exclusive jurisdiction to regulate and interpret collective bargaining agreements, it has no authority to award damages in tort in favor of members and against the union. We remain of the view expressed in *Dunbar*:

> "We are cited to no authority, for example, which insulates a union for its negligent and tortious conduct toward one of its members, i.e., if a member of a union was struck by a motor vehicle owned by the union and operated by one of its officials during the course of his employment for the union, we cannot believe the union would be insulated from liability on the basis that the only duty it owed toward its members was that of fair representation. If a union's unreasonable conduct results in the death of one of its members, it should not be excused from liability because of the legal fortuity of its organizational status anymore than if its conduct brought death to a nonunion member." 100 Idaho at 527, 528, 602 P.2d at 25, 26.

The decision and orders of the trial court granting summary judgment and dismissal of plaintiffs-appellants' complaint are affirmed. Costs to respondent.

DONALDSON, C.J., concurs, and BAKES, J., concurs in parts I and II.

BISTLINE, J., dissenting.

The majority holds that Carroll v. United Steelworkers of America, 107 Idaho 717, 692 P.2d 361 (1984), is indistinguishable from today's case, and upon that basis affirms the district court's decision granting the defendant's motion for summary judgment. Because it *is* virtually indistinguishable, again I dissent as was also required in *Carroll*.

As I pointed out in *Carroll*, the majority's conclusion that the United Steelworkers of America assumed no duty to the plaintiff, Michael Carroll, was based upon the mere citation to one hornbook and three perfunctory paragraphs of discussion. *Id.* at 722, 692 P.2d at 366 (Bistline, J., dissenting). The majority also ignored the fact that we were dealing with a motion for summary judgment, and failed to construe all of the evidence, and inferences which could be drawn therefrom, most favorably to the plaintiff as the party against whom the motion was directed. *Id.* The result of that failure had a catastrophic impact on Idaho jurisprudence.

Today's majority, in relying upon *Carroll*, perpetuates the illogical, unreasonable, and callous indifference to an individual's injuries that *Carroll* created. On the reasoning set forth in my *Carroll* dissent. I am again unable to join the opinion which this day becomes the opinion for the Court.

My dismay with today's opinion rests not only upon the majority's reliance upon *Carroll*, but on internal inconsistencies of that opinion. For example, on pages two and three of the slip opinion, it is stated that: "The trial court, in its memorandum opinion, also suggested this Court re-examine its decision in Dunbar [v. United Steelworkers of America, 100 Idaho 523, 602 P.2d 21 (1979), *cert. denied*, 446 U.S. 983 (1980)], as to whether the claims of plaintiffs-appellants are preempted under federal labor law. *We decline the invitation since that issue*

is not necessary to the decision in the instant case." (Emphasis added.) On page six, however, a 180-degree turn-about is observed: "Although perhaps not necessary to this decision, we reaffirm our holding in *Dunbar*." Such a caliber of decisionmaking leaves something to be desired. Preferably, where the majority bases its judgment today on *Carroll*, it should re-examine its validity and do so in light of the principles of jurisprudence advanced in the *Carroll dissent*. In this, the second year since *Carroll*, the majority has yet to meet the contentions of that dissent, which contentions are now presumably observed to be unassailable. On other occasions, concededly on a decelerating scale, a majority opinion of this Court would ordinarily explain in its opinion the error in the reasoning of a dissent.

HUNTLEY, J. concurring and dissenting.

The majority, in its treatment of the negligence claim, has granted to labor unions that which no other person or entity has under American law—*immunity from liability for tortious conduct.*

I do concur in the majority's treatment of the fraud claim. As to the presumption issue, I concur in the result reached but analyze the issue somewhat differently.

I. THE NEGLIGENCE CLAIM

The trial court granted the Union's motion for summary judgment of dismissal on the Miners' negligence claim concluding that the Miners' had not established that the Union owed a duty to the deceased miners. The trial court's memorandum opinion in support of its order granting the motion for summary judgment on the negligence claims is set forth in footnote 1 hereto.[1]

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[1] Plaintiffs seek to hold the Union responsible on negligence theories. A fundamental component of a negligence claim is the existence of a duty toward another. *Hoffman v. Simplot Aviation,*

The memorandum decision of the learned trial court is well-reasoned but proceeds from a faulty focus or in-

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Inc., 97 Idaho 32, 539 P.2d 584 (1975). A duty is a standard of conduct to which the defendant is required to conform. *Algeria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980). Plaintiffs rely on the collective bargaining agreement and RESTATEMENT (SECOND) OF TORTS, §§ 323 and 324A (1965), as the sources for the legal duty owed by defendant Steelworkers.

A breach of contract is not in and of itself a tort. A contract may, however, create a situation which furnishes the occasion for a tort. When a person renders services to another pursuant to a contract or otherwise, the law imposes a duty of care in the performance of those services. "The duty of care arises . . . irrespective of contract," and "[t]here must be a breach of duty apart from the non-performance of a contract." *Taylor v. Herbold*, 94 Idaho 133, 484 P.2d 664 (1971). Mere failure to carry out contractual obligations cannot support a tort action while misfeasance in the performance of contract obligations may support a tort action.

Plaintiffs complain the Union "failed to develop an adequate program for inspection and for safety, . . . failed to inspect," and "failed to require other safety devices to be used." Clearly the plaintiffs are upset with what the Union did not do, not with what it did do. Non-performance of alleged contractual duties will not sustain a tort claim.

The "Good Samaritan Doctrine" is enunciated in RESTATEMENT (SECOND) OF TORTS, §§ 323 and 324A. Section 324A reads:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for the physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if:
>
> > (A) his failure to exercise reasonable care increases the risk of such harm, or
> >
> > (B) he has undertaken to perform a duty owed by the other to the third person, or
> >
> > (C) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Section 323 is substantially the same as 324A except it deals with the situation where an individual undertakes to render services directly to another person.

We start with the premise there is no duty to be a good Samaritan. The law will only hold a defendant liable if the

correct predicates in several respects: First, the trial court embarks upon a lengthy analysis of whether the

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> plaintiff can meet the criteria laid down by RESTATEMENT. This Court has already held there is no proof the plaintiffs' decedents relied on the Union's safety activities. Therefore, the third possible criteria, that the harm is suffered because of reliance of the third person upon the undertaking, is not satisfied. Neither has the first criteria, i.e., the failure to exercise reasonable care increased the risk of harm, been met.
>
> In *Clemente v. United States*, 567 F.2d (1st Cir. 1978), the plaintiffs sued over the death of Roberto Clemente and two other passengers and crewmen in a private airplane crash. The plaintiffs alleged Federal Aviation Administration employees had acted negligently in failing to warn Clemente and other passengers the airplane was overweight and lacked a proper flight crew. The FAA had promulgated an internal order saying, "clear indication of alleged illegal flights should be made known to flight crew and persons chartering the service."
>
> The appeals court held the defendant United States could not be held liable on the Good Samaritan theory.
>
> > While the Federal Aviation Act empowered the administrative staff on the FAA to issue an order such as SO8430.20C, the act itself does not require this conduct. The agency, in issuing the order, was acting entirely gratuitiously and was under no obligation or duty to plaintiffs' decedents or any other passengers.
> >
> > [T]he *Restatement of Torts (Second)* §§ 323 and 324A n.7 makes it clear that liability in such a situation must be predicated on one of three grounds: the conduct of the employee actually increased the risk of harm to the damaged firm; the harm to the damaged firm resulted from his reliance on the employee carrying out the inspection as ordered; or there existed a prior duty to inspect owed by the employer to the damaged firm. . . . There was no underlying statutory duty to offer a special protection to plaintiffs' decedents; the failure to inspect *in no way added to the risk* of injury to the passengers or crew; and there is no evidence that anyone relied on the contents of SO8430.20C and limited their own safety precautions accordingly, (emphasis supplied).

Like *Clemente*, the Union's alleged failure to inspect, warn and make safe did not increase the danger to the miners beyond that under which they were operating. The Steelworkers may

Miners' claim meets the requirements of Restatement of Torts (2d) Sections 323 and 324A, which he characterizes as the "Good Samaritan Doctrine." From there the court reasons plaintiffs' cause fails because non-performance (as distinguished from misfeasance) will not support a tort action, the trial court stating:

> "Clearly the plaintiffs are upset with what the Union did not do, not with what they did do."

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not have helped the miners' safety problems, but they did not augment them either. See also *Blessing v. United States*, 447 F.Supp. 1160 (E.D. Pa. 1978). The Court notes the case at bar is also akin to the *Clemente* case in that there is no evidence the rank-and-file Union members limited their own safety precautions because of Union activities.

Lastly, the defendant did not undertake to perform the safety functions owed by Sunshine Mine to the rank-and-file. The collective bargaining agreement clearly placed the responsibility for making the work place safe upon Sunshine Mine.

> The company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment . . . .
>
> . . . Advice of the safety committee, together with supporting suggestions, recommendations and reasons shall be submitted to the plant manager for his consideration and for such action as he may consider consistent *with the company's responsibility to provide for the safety and health of its employees* during the working hours of their employment and the mutual objectives set forth in section 1. (emphasis supplied).

The collective bargaining agreement makes it very clear the primary responsibility for the rank-and-file members' safety and health was placed upon the company as opposed to the Union which could only act in an advisory capacity. The Union could talk all it wanted to but when it came right down to it, the Union was without authority to force any safety and healh measure upon the company except in highly limited, and for our purposes here, irrelevant circumstances. Herein lies the central factor in this dispute. The technical requirements of the RESTATEMENT aside, it is fundamentally unfair to hold a party liable for a condition it did not create or worsen and which it had no jurisdiction to correct. Summary judgment is granted dismissing all of plaintiffs' negligence claims.

Both premises are incorrect. The record establishes that the Unions' safety undertaking was not the act of a "Good Samaritan" but was in fact a substantial part of the Union's offering in consideration of the workers' membership and payment of dues. The Collective Bargaining Agreement provided for the Union's safety inspection function, which service was bought and paid for by union dues. In any event, it provides an incorrect focus to view and interpret Sections 323 and 324A under the rationale of the Good Samaritan Doctrine—the Restatement does not so characterize those sections and their specific language includes the rendering of services "for consideration." In this regard, the address of I.W. Abel, President of the U.S.W.A. in his November 1969 address to the delegates to the "International Conference of Safety and Health of the Steelworkers' (Appendix A hereto) is instructive. Moreover, the characterization of the Miners' claim as one for mere non-feasance which did not increase the risk of harm is incorrect. As the analysis below will demonstrate, the Union, through its representatives, did embark upon safety inspections, and the issue is whether they negligently performed that undertaking, or whether the Union's negligent performance resulted in the men being subjected to increased hazards or potential for death on the date of the fire and explosion that would otherwise have been the situation had the inspections been performed without negligence.

As its second premise for a foundation of its dismissal of the negligence cause the trial court opens:

> Lastly, the defendant [USWA] did not undertake to perform the safety functions owed by Sunshine Mine to the rank-and-file. The collective bargaining agreement clearly placed the responsibility for making the work place safe upon Sunshine mine.

However, a more detailed exposition below will demonstrate the Miners' cause is not premised on either a claim

that the Union should perform management's safety functions or that the Union should make the workplace safe—rather the cause of action is premised upon the Union negligently performing those safety functions which it did in fact undertake.

Recently, in Carroll v. United Steelworkers of America, 107 Idaho 117, 692 P.2d 361 (1984), this Court ruled that mere nonfeasance, even if it amounted to wilful neglect to perform a contract, is insufficient to establish duty in tort. In *Carroll*, a Union member accused his Union of failing to perform protective actions relative to conducting safety inspections at the work site but did not allege negligent performance of those actions once undertaken. In *Carroll*, no inspections were made. In the instant case, by contrast, the safety committee did inspect the mine and the miners allege *not* that the Union members of the safety committee *failed* to inspect but that they actually performed their duty of inspection in a negligent manner and failed to report what should have been obvious safety problems, the duty to report necessarily flowing from the act of inspection. Hence, the instant case does not present a situation of non-feasance but one of malfeasance.

The Miners assert that the basis of a negligent undertaking is established in this case under *both* the collective bargaining agreement and the Constitution of the Union. The Constitution of the International Union and of the Local Union provided in pertinent part:

> Object . . . to establish through collective bargaining adequate wage standards, shorter hours of work, and improvements in the conditions of employment for workers and industry.
>
> . . .
>
> A safety and health committee under the direction of the International Union or its designated representative, shall be established in each Local Union.

At the time of the fire, there existed a collective bargaining agreement between the Union and the Sunshine Mining Company dated March 11, 1970 which provided in Article 9, Section I, the following:

> The Company and the Union will continue to cooperate toward the objective of eliminating accident and health hazards. The Company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment. Protective devices, wearing apparel and other equipment necessary to protect employees from injury shall be provided by the Company in accordance with practices now prevailing in each separate department or as such practices may be improved from time to time by the Company.
>
> An employee who believes that he is being required to work under conditons [sic] which are unsafe beyond the nornmal [sic] hazards inherent in the operation in question, may request an immediate meeting with the shift boss, with or without consultation with his Assistant Grievance Committeeman. If, as a result of these actions, the employee still believes he is being required to work under conditions which are unsafe beyond the normal hazards inherent in the operation in question, a committee consisting of two (2) supervisory personnel and two (2) reliable employees, approved by the Union, shall inspect the operation in question within twenty-four (24) hours and shall decide what steps, if any, are necessary to correct the hazard.
>
> In the event the committee cannot agree, the employee involved may then file a grievance in Step 2 of the grievance procedure. It is understood and agreed that if a grievance is filed on an unsafe working condition, management and Union representatives shall give said grievance preferred handling,

and shall expedite its movements through the grievance procedure.

The employee may on request, be relieved from the job and be assigned to other work at the discretion of the Company. If an employee exrcises [sic] his rights under this section and the Company believes conditions are not beyond the normal hazards inherent in the operation in question, nothing contained in this section shall abridge the rights of the Company under other sections of this Agreement.

Neither shall the foregoing preclude the Company from assigning another employee to the job in question and it is further understood that no employee, other than communicating the facts, shall take any steps to prevent another from working on the job.

A Safety Committee consisting of three employees designated by the Union and three Management members designated by the Company shall be established. By mutual agreement, the committee may be increased to not more than six representatives for each party. The safety committee shall hold regular meetings at times determined by the committee. The function of the safety committee shall be to advise the Plant Manager concerning safety and health matters but not to handle grievances. In the discharge of its function the safety committee shall: Consider existing practices and rules relating to safety and health, formulate suggested changes in existing practices and rules, and recommend adoption of new practices and rules. Advice of the safety committee, together with supporting suggestions, recommendations and reasons shall be submitted to the Plant Manager for his consideration and for such action as he may consider consistent with the Company's responsibility to provide for the safety and health of

its employees during the hours of their employment and the mutual objectives set forth in Section 1.

A Union member and a Management member of the safety committee may accompany the State Mine Inspector or his Deputy, on any inspection made at the property.

Two men shall be designated by the Union to accompany the Safety Engineer on the tours of the mine. Once each month, one of these two men together with the Safety Engineer, shall make a tour of a section of the mine. The results of this tour shall be considered at the following Union-Management safety committee meeting.

In the event a recommendation with respect to safety conditions that needs action immediately, concurred in by a majority of the entire committee, is not carried out, the Union may have recourse to the greivance [sic] procedure.

Affidavits established that a health and safety committee was formed. As a matter of practice within the Union, the committee members of the health and safety committee required by the constitution were also members of the joint safety committee required under the collective bargaining agreement. The Miners assert that since the inspections and recommendations regarding practices and rules were services to be performed by the Union for the benefit of its member miners, the Union had a duty to use due care in performing these services.

The Restatement (Second) of Torts, § 323 (1977) states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure

to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm,

(b) the harm is suffered because of the other's reliance upon the undertaking.

The Miners assert that evidence was presented to establish the following:

(1) John Rawson, Glen Rossiter, Wayne Johnson and Don Wood did not have the use of self-rescuers; (oxygen masks and cannisters)

(2) Self-rescuers were stored in boxes with padlocks;

(3) Some of the self-rescuers were eighteen years of age and were corroded so that the valve could not be turned to operate them;

(4) Some of the self-rescuers were inoperative and others were used by miners who sensed them getting hot and discarded them not knowing that the development of heat was an indication that the self-rescuer was working;

(5) The miners did not know how to use self-rescuers that may have been available and had not been trained in their use;

(6) No self-rescuers were stored at the 5,400 level where John Rawson and Glen Rossiter were stationed; at other levels there were fewer cannisters than the usual number of men working at those levels; and that there were only six units at the major escape route at the 3,100 foot level.

(7) There were no periodic fire drills or evacuation drills for miners working underground;

(8) There were no opportunities for the miners under controlled circumstances to become familiar with proper exit procedures and sequences; and

(9) There were no periodic checks or tests made of a stench warning system and many of the survivers testified to facts permitting the inference that the system did not work.

10) Evidence exists that the fire was started by spontaneous combustion in a pile of accumulated rubbish.

The Miners contend that most of these deficiencies could have been observed and should have been observed in the course of a reasonable inspection and, further, that recommendations could have and should have been made with regard to these deficiencies. A reasonable inference which the trial court should have drawn in favor of the miners is that the inspecting personnel were negligent in not seeing and reporting some of those conditions. We cannot say as a matter of law that had the inspectors reported these blatant violations to the committee, with the committee in turn reporting them to management, that management would have corrected these defects—neither was the trial court correct on summary judgment to resolve that factual issue the other way. Rather such is an issue of proximate cause not properly resolved on summary judgment. The record is devoid of any opposing affidavits or deposition testimony that the inspections were in fact conducted in a reasonable and prudent manner in accordance with recognized standards.

Construing the facts and the inferences most favorably toward the parties against whom summary judgment is sought, and absent a record establishing that management had no concern for safety, the reasonable inference would be that management would have acted responsibly had these matters been brought to its attention.

In light of the above record, we cannot conclude as a matter of law that the Union owed no duty to exercise due care in performance of the inspections once its personnel undertook them. Moreover, we cannot conclude as

a matter of law that the Union owed no duty to bring to the attention of the members of the safety committee the safety problems that existed in the Sunshine Mine. Be cause the Union, pursuant to the provisions of the collective bargaining agreement, had contracted to inspect and, *in fact inspected* the mine, it owed the (minimal) duty to its members to exercise due care in inspecting and in reporting the findings of its inspection. For this reason I would reverse the trial court's order granting the Union's motion for summary judgment of dismissal as to the negligence claims.

II. THE PREEMPTION ISSUE

In Dunbar v. United Steelworkers of America, 100 Idaho 523, 602 P.2d 21 (1979), which case arose out of the same facts as the instant appeal, this Court held on remand that material issues remained regarding whether the Union had a duty to inspect and whether it breached that duty. In *Dunbar*, the question of the existence of a duty was never reached since the trial court held that the cause of action was preempted by the federal duty of fair representation. Justice Bakes, specially concurring in Part I of *Dunbar*, wrote:

> I concur with the majority's ruling that the trial court erred in dismissing the appellants' wrongful death action against respondent United Steelworkers because of the preemption doctrine. An action for wrongful death is a creature of our state statutes, is of substantial local interest, and traditionally has been committed to the jurisdiction of the courts of the state. Moreover, this action for wrongful death is unlikely to present the identical legal issues as a proceeding under the federal labor laws arising from this same factual setting. Assertion of jurisdiction by the courts of this state over the appellants' action would appear to present no significant risk of undue interference with national labor policy.

No provision of the National Labor Relations Act provides that it is federal policy to immunize labor unions from responding in tort for their negligent acts. In Brown v. Hotel & Restaurant Employees & Bartenders, —— U.S. ——, 104 S.Ct. 3179 (1984) the court noted:

> The National Labor Relations Act . . . leaves much to the state, though congress has refrained from telling us how much.

The Union argues that *all* relationships between a union and its members flowing from a collective bargaining agreement are preempted, with the union's duty being only that of "fair representation." This leads to some rather fuzzy analysis. Preempt is defined as "to seize upon to the exclusion of others," Webster 3d Int'l Dictionary. Although the NLRB has been given exclusive jurisdiction to regulate and interpret collective bargaining agreements as to ongoing performance and modification, the NLRB has not been given (nor has it seized) the function of considering tort damages for wrongful death for past union misfeasance. I remain of the view expressed by the majority of this Court in *Dunbar*, *supra* at p. 527:

> We are cited to no authority, for example, which insulates a union for its negligent and tortious conduct toward one of its members, i.e., if a member of a union was struck by a motor vehicle owned by the union and operated by one of its officials during the course of his employment for the union, we cannot believe the union would be insulated from liability on the basis that the only duty it owed toward its members was that of fair representation. If a union's unreasonable conduct results in the death of one of its members, it should not be excused from liability because of the legal fortuity of its organizational status anymore than if its conduct brought death to a nonunion member.

Recently in Allis-Chalmers Corp. v. Roderick S. Lueck, —— U.S. ——, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985) the United States Supreme Court held that when resolution of a state-law claim is substantially dependent upon analysis of the terms of a collective bargaining agreement, that claim must either be treated as a § 301 claim or dismissed as preempted by federal labor-contract law. In *Allis-Chalmers*, the United States Supreme Court reversed a Wisconsin Supreme Court decision which had held that a claim that a Union had handled an insurance claim in bad faith was not pre-empted because under Wisconsin law the tort of bad faith is distinguishable from a bad-faith breach-of-contract claim, and that although a breach of duty is imposed as a consequence of the relationship established by contract, it is independent from that contract. In reversing the Wisconsin decision, the United States Supreme Court concluded that the right asserted by the Union member was rooted in contract, and the bad-faith claim could have been pleaded as a contract claim under § 301. The Court concluded that unless federal law governed that claim, the meaning of the disability-benefit provisions of the collective bargaining agreement would be subject to varying interpretations, and the congressional goal of a unified body of labor-contract law would be subverted. The *Allis-Chalmers* Court stated, "Because the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, any attempt to assess liability here inevitably will involve contract interpretation. . . . These questions of contract interpretation, therefore, underlie any finding of tort liability, regardless of the fact that the state court may chose to define the tort as 'independent' of any contract question. Congress has mandated that federal law govern the meaning given contract terms. Since the state tort purports to give life to these terms in a different environment, it is preempted." In the instant case, however, we need not interpret a contract. The appellants are suing for breach of a duty

to inspect and report under the reasonable and prudent person standard.

Both the Union on appeal and the trial court in its memorandum decision urge this Court to reconsider its holding in *Dunbar*. The trial court stated:

> This case does not involve a collective bargaining agreement whereby the Union assumed management safety responsibilities and therefore management's common law duties. In Helton v. Hake, 564 S.W.2d 313 (Mo. 1978), the collective bargaining agreement provided the Union steward would ensure no work was done in the immediate area of high tension lines. The agreement distinctly said the employer was in no way responsible for the performance of these safety functions by the steward.
>
> . . .
>
> . . . When the Union takes actual authority for enforcing safety conditions on the work site away from management, it should be held responsible for breaches in a duty of care just as management would have been at common law. The defendant Union's collective bargaining agreement with Sunshine did not allow the Union to enforce safety measures. The Sunshine/Steelworkers' contract did say the Union "shall inspect," but the Union could do nothing but advise once it had been reported.

While the trial court concluded that *Helton* supported the Union's positon, in fact it supports that of the Miners. In *Helton*, the Missouri court stated:

> The complaint alleges that the Union, through its agent, the steward, negligently and carelessly failed to enforce the safety rule relating to work in the area of high tension power lines. The suit is clearly brought as an action in tort seeking recovery for wrongful death due to the alleged negligence of the defendants. The only relevance of the collective bar-

> gaining agreement appears to be that it would determine, to some extent at least, the nature and scope of defendants' duty.

Likewise, in the instant case, the provisions of the collective bargaining agreement do not require interpretation, as was the case in *Allis-Chalmers, supra*, but rather the provisions determine only the nature and scope of the Union's duty. The trial court acknowledges that the Union had a duty to "advise;" and it is *that* duty which appellants contend was breached. Whether the Union breached the duty and whether such breach, if established, was the actual or proximate cause of the appellants' decedents' deaths, are not issues addressed by this appeal. Our narrow holding today should be that the Union, having inspected, assumed a duty to use due care in inspecting and, from the duty to use due care in inspecting, arose the further duty to advise the committee of any safety problems the inspection revealed. Moreover, since an action for wrongful death is a creature of our Idaho statute, is of substantial local interest, and traditionally has been committed to the jurisdiction of the courts of the state and because the instant action does not require an interpretation of the terms of the collective bargaining agreement, it is not preempted by federal law.

In Heckler v. International Brotherhood of Electrical Workers 772 F.2d 788 (11 Cir. 1985) the court correctly analyzed the non-applicability of the preemption doctrine to cases of this nature [2]:

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[2] The *Heckler* court blinked and waffled shamefully by its final qualifying paragraph:

> The narrow scope of this holding should be emphasized. This case is distinguishable from earlier cases in which a plaintiff sought relief from a union under a collective bargaining agreement for a breach of the union's general duty to inspect for the safety and benefit of the entire work force. In this case, the employee alleges a duty running from the union to her individually that required it to assure she was qualified to work before she was assigned.

The employee's state law action does not run afoul of the recent pronouncement in Allis-Chalmers Corp. v. Lueck, 53 LW 4463 (1995), in which the Court found preempted a state action for bad-faith handling of an insurance claim arising out of a disability insurance plan included in a collective bargaining agreement. The tort in that case was essentially a product of the labor contract itself—without the contract, no tort claim could have existed. In this case, the claim is essentially one of common law negligence for breach of a duty of care. Liability will turn on basic negligence principles as developed by state law.

A union breaches its duty of fair representation only when it treats an individual in an arbitrary, discriminatory, or bad faith manner. Vaca v. Sipes, 386 U.S. 171 (1967). Two key issues must be addressed to determine whether a common law negligence action is preempted by the federal remedy for breach of such a duty. First, a court must determine whether the duty the union allegedly breached is so inextricably intertwined with the collective bargaining agreement that only a duty of fair representation claim is available. Second, in making this determination, the court must be aware of federal labor law policy and whether a negligence action against a union impermissibly impedes the federal labor-management regulatory scheme.

With regard to the latter concern, the primary inquiry is whether the duty sought to be enforced against the union is so tangential to the federal scheme that the action is properly exempted from the general preemption rule. Balancing of the relevant factors leads to a conclusion that the employee's negligence claim is not preempted.

The union's duty of fair representation does not displace those duties created by state law that pro-

hibit a person or corporation form [sic] engaging in tortious conduct resulting in death or injury. Nothing in the federal statutory scheme expressly addresses such conduct or provides a mechanism for its redress. Likewise, it cannot be said that by failing expressly to address acts of negligence by unions, Congress intended to permit unions to engage in such acts free of the scrutiny of state courts.

Nor is the union's contractual duty to assure worker training inextricably intertwined with its federal duty of providing fair representation. The fact that reference to a collective bargaining agreement must be made in order to define the scope of the duty does not mean that a negligence action is no more than a preempted § 301 action. Even if the state action threatens adjudication of matter cognizable by the National Labor Relations Board or a court adjudicating federal labor law, the extent of that threat must be balanced against the importance of the action to the state. No impermissible conflict exists in this case.

I would affirm as to the fraud claim and reverse and remand for trial on the negligence claim.

APPENDIX "A"

I. W. ABEL

President

United Steelworkers of America

Thank you very much, Director Schremp, our good friend and your host director on this great occasion, Director Germano, Chairman of our National Committee and Board Members on Safety and Health, Board Member Younglove, Director Thornton, and associates of Paul's, Marco, Adolph and Al Skinner, members of the staff and this great assembly of delegates of the International Conference of Safety and Health of the Steelworkers.

I perhaps should start off this morning, Joe, in the tradition of the times by spending a few minutes, a half hour, three-quarters, berating you over the conditions of the climate here in this great City of Chicago. In keeping with the times, I should say it is your fault. But I should remind you that when we were last in convention, you arranged to have it hotter than hell for us. Now you make it all but impossible to get in because of fog and smog. I, like others, had intended to get in last night but found myself grounded in the city of brotherly love, Philadelphia, because it was impossible to get here. Then this morning, after we arrived we found ourselves circling overhead for a full hour waiting our turn to come in. I couldn't help but think as we circled, knowing the conditions, such as only one runway being used and visibility at one-half mile, that I was coming to a safety conference. I don't mind telling you as we flew around I found myself hoping that all of these wonderful safety implements that the airlines and the air industry has developed would be working in topnotch shape. I found myself hoping, too, that those poor workers, those human beings that operate this equipment would this morning be living by the rules, by the book, and I'm telling you

it is a good feeling when finally you get a glimpse of the ground and then you feel yourself hit the runway to know that not only was the equipment working but the workers were working by the rules and by the book. So it was under these conditions that I come this morning.

Joe, I won't take time holding you responsible because I know in this instance, like many other instances, we get too much hell for things for which we are not responsible as it is.

I'm pleased to be here this morning to see such a great turnout. That is an indication of the tremendous interest and concern that our local unions have throughout the great countries of Canada and the United States for safety and health in our industries.

I want to thank Director Schremp for asking me to talk to you about safety and health and I also want to compliment him and his associates, outstanding individuals such as Marco and Adolph and Al Skinner for what they are doing in an area of extreme importance to our membership and what they have accomplished in a few short months since they have been given and have assumed the responsibilities of our Safety and Health Department.

This international conference signifies the increased emphasis that our Union intends to place upon the safety and health of members of the United Steelworkers of America.

There have been many changes for the better in our Union in the last few years—increased participation in bargaining—exemption of the Industry Conference concept—a new Department of Organizing—establishment of a Strike and Defense Fund—breakthoughs on incentives and earnings protection—highest earnings and best pensions in our history. And while all of these are important, they are no more important than the safety and health of our members that work in the mines, the mills and the factories throughout our jurisdiction.

I am not here today to perform a routine function of my office as President and say a few words of welcome as part of an opening ceremony. I am here today because I believe as strongly as I can in making the workplaces in our jurisdiction the safest and healthiest places there are.

And I am here because I also believe as strongly as I can in making our communities safer and healthier places in which to live and to bring up a family. There is no reason why steel communities must be dirty and unsafe places to work and live.

I am here today because I want to attempt to convey to you—and through you to our membership—that our Union is making occupational health and safety a top priority. That is why we have recognized our Department of Safety and Health and given it added manpower. We may have been remiss in this area in the past. But we are not going to be remiss in the future, that I assure you.

I know, as well as you know, that safety and health are difficult subjects in which to arouse interest. Some of our members even resent being told to wear protective equipment. Others object to safety rules. But safety and health are somewhat like unemployment. An unemployment rate of 4% doesn't impress you if you are among the 96% working. But it certainly impresses the hell of you if you are one of the 4%. To put it another way—it's a recession, we have often heard said if your neighbor's out of work; but if you're out of work, it's a depression.

Unfortunately, that's the way it is with safety and health. A healthy and uninjured worker too often has little interest in safety and health. Of course he should not have to suffer a disabling injury or incur a disease from some dangerous toxic agent to have the kind of interest he should have. One of our jobs is to make our

members—and the companies—as safety and health conscious as possible.

Unfortunately, there doesn't seem to be much "sex appeal" in industrial safety and health. It's difficult to arouse interest in these areas—not only among many workers, but among our legislators and the general public.

It has been said that the American public isn't too concerned over atomic fall-out because so far it hasn't affected television reception. Perhaps the same could be said about concern over safety and health. We, too, seldom get concerned unless and until an accident or tragedy hits home and affects us.

Now I want to cite two examples of a tragic loss of life to demonstrate my point over industrial accidents and how they relate to public and governmental interest and concern.

You all recall the horrible tragedy that took the lives of three astronauts when fire consumed the Apollo One space capsule at Cape Kennedy on January 27, 1967. The Nation properly paid tribute to the astronauts and mourned their deaths. But then there was registered great national concern and a national demand that immediate steps be taken to prevent a recurrence—and rightfully so. A seven-man board was appointed to investigate that fatal fire. After 10 weeks of investigation, the board issued a 3,000-page report which blamed a faulty wire as the probable cause and cited other deficiencies in engineering and manufacture in the Apollo project. Millions of dollars were spent and corrective measures were effected. You also recall, I am sure, the headlines and extensive publicity given the accident and investigation by all the news media.

Now, a few weeks before this tragedy struck the astronauts, three Steelworkers were killed in an oxygen-making plant of Great Lakes Steel when a compressor

blew up. Director Charley Younglove, Dirctor of our Permanent Safety Committee of the Board, was out to the plant within a half hour or 45 minutes after the accident, and he told me the bodies of the three men could not even be identified. He told me that the compressor chamber, made of iron about 2½ to 3 inches thick, was just melted down, like melted ice. Here was an accident just as tragic as the one that claimed the lives of the astronauts—three men burned beyond identification—three men who also left behind families. But what kind of interest did this accident arouse?

It barely was given any attention even in the area where it happened. The Detroit News, for example, carried a brief item—about three inches long—on Page nine.

Here we had two separate but similar accidents—three men killed in each—three families left without fathers and husbands. Yet one gets national attention, a lengthy investigation with no effort or expense spared to prevent a recurrence—and the other goes barely noticed.

In no way do I mean to detract from the dedication and sacrifice of our astronauts. I only ask that the same concern be shown other human beings who also give of themselves in the occupations they pursue. And we, as union members, as workers, as union representatives, as part of the general public, must demand the same kind of concern and precautions for workers in the plants as for astronauts in their space capsules.

There is still another example of what I mean by relative concern over industrial safety. Many Americans are greatly aroused over Vietnam and the deaths that result from our involvement there. But—as Secretary of Labor Shultz told the recent AFL-CIO convention in Atlantic City last month—how many people know that in the last eight years more Americans have been killed at their workplace than in Vietnam?

Again, I do not mean to detract from the sacrifices of our fighting men in Vietnam. I cite the contrasting figures to demonstrate the lack of equal concern by many Americans over the sacrifices of workers in their jobs on the home front.

I am sure most of you are familiar with the vast difference between worktime lost through strikes and time lost through industrial accidents. But for the benefit of those who don't—let me again review them. In 1967, 42.1 million man-days were lost due to strikes but 245 million man-days were lost as a result of occupational injuries. In short, six times as much time was lost because of injury as was lost because of strikes.

The statistics on industrial safety and health are truly shocking—14,800 workers killed last year in accidents—2,200,000 disabilities suffered—$1½ billion lost in wages —$7.8 billion lost in gross national product.

In more specific terms consider the following toll that is exacted upon American workers: Of the 6,000 men who have been uranium miners, an estimated 600 to 1,100 will die of lung cancer within the next 20 years because of radiation exposure on the job.

More than 3,000 cases of silicosis are reported every year from exposure to free silica. One out of every four or five asbestos workers in New York City dies of lung cancer caused by the inhalation of asbestos fibers.

Yes, industrial disease poses a threat just as great, if not greater, than industrial accidents. It is estimated that every 20 seconds a new and potentially deadly toxic agent is introduced in industry. A recent study involving 3,200 workers in 231 foundries reveals that one in 15 of such workers was exposed to environmental conditions capable of producing disabling and fatal diseases. Some chromium compounds, widely used in metal working and plating, are suspected cancer agents.

So one can easily see that the present toll, and possible toll—when you include the silent killers, the gases, the fumes, etc.—is a costly one and potentially more costly.

Let me demonstrate this toll in relation to the time that is devoted to this conference here today and tomorrow.

This is a two-day conference. During this two-day conference 110 workers in the United States will die from on-the-job accidents, or work-related diseases. During these two days 54,000 workers will suffer injuries on the job. And during the two days of this conference, 17,000 will suffer disabling injuries or work-related diseases.

But these are cold statistics which convey some of the seriousness of the safety problem but do not reflect the cost of industrial accidents in human terms. You cannot put a price tag on human life, or human suffering, the mental anguish which results, the plans and hopes which have to be scrapped and forgotten. These are the real costs of accidents—not the man hours of time lost but the men lost; not the loss in gross national product but the loss of life and limb; not the money lost in wages but the permanent loss of a limb or the permanent loss of a faculty.

And yet, despite the losses—in time and money and human suffering—the struggle for effective legislation and enforcement is an uphill struggle. There has been a failure at all levels of government to provide effective safety and health standards but State governments have been the worst violators. With a bare handful of exceptions, states have failed to provide even the most primitive standards to protect workers. The Federal government isn't much better. Consider these facts: There are only 1,600 safety inspectors of any kind, State or Federal, in the entire United States; four states have no inspection personnel whatsoever; only three states have inspectors who are trained in the field of occupational health and

industrial hygiene. You know, the ironic thing is that there are twice as many fish and game wardens in the United States as there are safety and health inspectors.

Why is there this great absence of effective legislation and enforcement? To put it simply and bluntly: Because legislators at all levels of government have been more concerned with the profit motive than the human motive.

State legislatures generally have been notorious in catering to special interests and Congress hasn't been much better. Under the Walsh-Healey Public Contracts Act, the U.S. Bureau of Labor Standards is charged with inspecting companies that have government contracts. But because Congress limits funds for such activities, the Bureau inspects less than 8% of the covered plants each year. I remind you that Congress didn't get too concerned about mine safety until 78 miners were killed in the mine disaster at Farmington, West Virginia. And an effective national mine health and safety act is still not a certainty as we meet here today.

The disgusting truth has been that industry's arguments against the costs of effective safety and health equipment have outweighed arguments that cost should not be the primary consideration.

Whenever a case is made for effective health and safety legislation business groups cut loose with a barrage of misleading propaganda. And when you strip away all the baloney—all the propaganda—the single, solitary reason for their opposition is that it will cost industry money.

How can anyone talk about costs when it comes to saving human life and limb? I say that no matter what it costs in dollars and cents, it must be done. I say that it's about time our Congress and our States tell industry to stop crying about costs and to do what must be done about safety and health.

While we can, with justification, point a finger of blame at our lawmakers, some of the blame lies with ourselves. We have not been as active or effective in political action as we can or should be. We have not elected enough of the right kind of people as often as we should. And when we have elected enough of the right kind of people, we have failed to receive a good enough return for our efforts.

The question now is, however, where do we go from here?

First, we start within our own Union, and we already have taken some significant steps. Your International Executive Board has established a permanent standing Committee on Safety and Health. We have reorganized and strengthened our Department of Safety and Health. We asked our districts to name Safety Coordinators, and we already have had a meeting of such coordinators in Pittsburgh. A comprehensive safety and health program has been drawn up by Director Schremp's Department for strengthening health and safety practices at the local union level. The holding of this conference, during which the new program will be discussed, is another example of added emphasis upon safety and health by our Union. One of the major features of the new program, for example, is the emphasis upon the importance of writing strong safety and health provisions in our collective bargaining agreements.

I want to say a few words about utilizing the collective bargaining process to incorporate safety and health provisions in our contracts. In my remarks to the Industrial Union Department's recent convention in Atlantic City, I urged the labor movement to establish a four-day workweek by 1973. I said that we should put a four-day workweek at the top of the list of our legislative and bargaining objectives. We can obtain that objective by amending the Fair Labor Standards Act so that a 32-hour

workweek can be made uniform through Federal action. Or we can reach that goal in collective bargaining. In urging unions affiliated with the IUD to work for the four-day week, I cited a number of reasons for doing so. One of the reasons we are advocating a shorter workweek is to reduce the hazards to the health of workers caused by long hours on the job.

It is a proven fact that after a certain age, production workers find it quite difficult to keep up with the iron horse. They become not only physically but also mentally tired.

Such wearing down of a worker's health eventually slows his reflexes which are his first line of defense against accidental injury. Thus, fatigue becomes another factor to consider in promoting safer and healthier working conditions. A reduction in the workweek, without a cut in pay, would do much to keep workers mentally and physically alert and thus help eliminate accident and health hazards.

Given another day each week free from their jobs, workers would have more leisure time with their families and friends for living and relaxing. They could give more adequate consideration to public issues. They would be in a better position to perform their duties as parents more competently, in such matters as their children's education—or as citizens.

The first great cries from the opponents of a four-day week have already been heard. They are spreading scare stories, alleging that this would be inflationary and that a shorter workweek would cripple the economy.

Such arguments are hogwash and I cite an article in the *Wall Street Journal*, an ad, if you please, calling a conference in the City of New York by 200 of our top leading industrialists and financiers, to there give consideration to the need now to institute shorter hours of

work because of the tremendous changes that are taking place in our economy and our American industry. Government data on increases in profits, dividends and real earnings provide enough evidence to prove such arguments are hogwash. Between 1960 and the first half of this year, the net profits of corporations skyrocketed 94.5%; dividend payments to stockholders soared 80%; but the weekly, after-tax take-home pay of the average non-supervisory worker increased only 35%, and in terms of buying power, only 10%. In brief, industry can well afford the four-day week. In fact, it would benefit industry in a number of ways. Productivity among workers on a short workweek would increase because there would be less time lost, less work would be spoiled due to fatigue and monotony on the job, there would be lower labor turnover and the quality of products would improve. So, all in all, it would benefit workers by reducing fatigue on the job and thus reduce accidents; and it would benefit industry in the ways I have just enumerated.

Now, beyond our obligations to incorporate safety and health protection in our contracts, and to beef up our program on safety and health within our Union, we also have an obligation to fight for adequate legislation.

And we have some fighting to do right now—the minute this conference ends. I'm talking about the fight we're making in Congress for passage of the kind of legislation which will provide us with one giant step forward for the health and safety of workers. Before Congress right now is the Williams-O'Hara Occupational Safety and Health bill. It was introduced in the Senate by Senator Williams of New Jersey and in the House by Congressman O'Hara of Michigan. The bill would authorize the Secretary of Labor to set standards to assure safe and healthful working conditions. It would establish an enforcement procedure with specified penalties for violations of the standards, and would provide for badly-needed research, training, and a uniform reporting procedure. It also would

assist the states in better enforcement, the gathering of information, and training. This is the bill that organized labor supports. This is the bill that we want and must have if the job is to be done.

Last month, in my capacity as President of IUD, I testified in Washington on behalf of this bill before the Subcommittee on Labor of the House Education and Labor Committee. I attempted to convey to the Subcommittee the sense of urgency that organized labor has about such legislation, and the great importance that we attach to it. I also told them what my views were on the bill proposed by the Nixon Administration. The Administration bill is a weak bill and would not do the job, which should not come entirely as a shock to anyone in this room. It would not cover all places in employment. It would set up a Board to develop standards but the bill would bind the Board to adopt standards developed by industry-oriented organizations. And it would strip the Secretary of Labor of any effective enforcement power. Additionally, it would not go into effect until two years after it was signed into law.

But testifying for a bill is not enough. It helps but it takes more than talk before a Congressional Subcommittee. It takes talk from members of organized labor. It takes letters from labor. It takes visits and delegations from labor. And if need be, it takes some informational picketing and a little hell raising. It seems to me that generation of support for the Williams-O'Hara bill should be your first order of business after you leave this conference. If we are to get the legislation we need, we have got to make our desires known to Congress; we have to get through to our Senators and Representatives—just as we have been trying to get through to them on the need for genuine tax reform. In short, we have got to generate some heat. There is no reason why every local union of the Steelworkers cannot communicate, by resolution or

letter, their support of the Williams-O'Hara bill to their Senators and Congressman. If every delegate to this conference could make it the business of his local to produce 10 letters, or post cards, or telegrams from members of his local, that would mean thousands of communications hitting the offices of our Representatives in Washington.

This is what it takes. You know it as well as anyone. It cannot be done with speeches, or mirrors. It takes the same kind of fundamental political action that we try to practice at all levels of our Union. I feel certain that Director Schremp, his Department, his two associates, and the Safety Coordinators will follow through on the development of the kind of support we need—and need quickly—to get the Williams-O'Hara bill enacted into law. If your local can send a delegation to Washington to talk to your Senators and Congressman, fine. If it can't do it, it certainly can see that a delegation visits the Congressman or Senators when they are back in their home districts and states.

As I said at the beginning of my remarks, I am here today because I believe safety and health are priorities for our Union. I am here because I want to communicate this belief to you and to ask your help in providing our members with the safest and healthiest work conditions that are possible.

I am also hopeful that out of our new Department, under Director Schremp, with Marco and Adolph at his hand, and through the assistance of the Safety and Health Coordinators, through the help of all of you and your local unions, will come an aggressive membership education program. I say this about membership involvement because the job that we must do cannot be done by our new Safety and Health Department alone. It cannot be done by the Coordinators alone. It cannot be done by our staff representatives alone. It will take the concern and involvement of all of us.

I know that Director Schremp has a full agenda for this conference and that you are going to hear some stimulating suggestions from other speakers. So I will conclude my remarks by expressing my appreciation for this opportunity to be with you today, and be a part of what I consider a most important conference, conveying to you the importance that your international officers attach to our hopes and plans in the field of safety and health in the months and years to come.

Thank you and best wishes for a most successful conference.

APPENDIX D

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT
OF THE
STATE OF IDAHO
IN AND FOR THE COUNTY OF SHOSHONE

Case No. 17694

THARON RAWSON, *et al.*,
Plaintiffs,
vs.
UNITED STEELWORKERS OF AMERICA,
Defendant,
and

Case No. 17741

BERNIECE JOHNSON, *et al.*,
Plaintiffs,
vs.
UNITED STEELWORKERS OF AMERICA,
Defendant,
and

Case No. 17742

LAURA DUNBAR, *et al.*,
Plaintiffs,
vs.
UNITED STEELWORKERS OF AMERICA,
Defendant,
and

Case No. 18222

MARY WOOD, *et al.*,
Plaintiffs,
vs.
UNITED STEELWORKERS OF AMERICA,
Defendant.

ORDER IN RE: MOTION FOR SUMMARY JUDGMENT

The facts of these cases were outlined in this Court's June 30, 1981, memorandum opinion. Briefly, these cases arise out of a 1972 underground fire at a mine owned and operated by the Suhshine Mining Company. Ninety-one Sunshine Mining employees were killed in the fire. On March 12, 1973, four separate, but identical, complaints were filed in the Shoshone County District Court by individual widows of the deceased miners, on their behalf and on behalf of their minor children. The plaintiff's complaints, as amended, allege the Steelworkers have engaged in negligence, gross negligence, fraud and constructive fraud in relation to the plaintiffs.

Much of plaintiffs' claims revolve around the collective bargaining agreement in force between the United States Steelworkers and Sunshine Mine at the time of the fire. The pertinent sections of the bargaining contract read:

> The company and the Union will continue to cooperate toward the objective of eliminating accident and health hazards. The company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment. Protective devices, wearing apparel and other equipment necessary to protect employees from injury shall be provided by the company. . . .
>
> An employee who believes that he is being requires to work under conditions which are unsafe beyond the normal hazards inherent in the operation in question, may request an immediate meeting with the shift boss, with or without consultation with his assistant grievance committeeman. If, as a result of these actions, the employee still believes he is being required to work under conditions which are unsafe beyond the normal hazards inherent in the operation

> in question, a committee consisting of two (2) supervisory personnel and two (2) reliable employees, approved by the Union, shall inspect the operation in question within twenty-four (24) hours and shall decide what steps, if any, are necessary to correct the hazard.
>
> In the event the committee cannot agree, the employee involved may file a grievance. . . .
>
> A safety committee corsisting of three (3) employees designated by the Union and three (3) management members designated by the company shall be established. . . . The function of the safety committee shall be to advise the plant manager concerning safety and health matters but not to handle grievances. In the discharge of its function the safety committee shall: consider existing practices and rules relating to safety and health, formulate suggested changes in existing practices and rules, and recommend adoption of new practices and rules. Advice of the safety committee, together with supporting suggestions, recommendations and reasons shall be submitted to the plant manager for his consideration and for such action as he may consider consistent with the company's responsibility to provide for the safety and health of its employees during the hours of their employment and the mutual objective set forth in section 1. . . .
>
> In the event a recommendation with respect to safety conditions that needs action immediately, concurred in by a majority of the entire committee, is not carried out, the Union may have recourse to the grievance procedure.

Plaintiffs contend the Union's representations leading up to the safety clause, the safety clause itself and the manner in which the Union conducted itself after inserting

the safety clause in the collective bargaining agreement subjects the Union to liability.

The defendant has moved for summary judgment on each of the counts contained in the amended complaints. The defendant makes a three-pronged attack which will be dealt with serially.

A. FRAUD

The amended complaint alleges the defendant made the following representations to its members, the rank-and-file of the Union:

> A. That it was a competent organization for protecting the welfare, safety and interests of its members, and had a concern for said welfare, safety and interest of its members.
>
> B. That it has a reliable degree of expertise in underground mining.
>
> C. That it would develop adequate programs of safety through its Union representatives for the benefit of its members, the rank-and-file of said Union.
>
> D. That it would provide constant Union representatives to participate in the inspection of the mine for safety and accident prevention.

The complaints go on to state these representations were false, material, relied upon by the rank-and-file members, plaintiffs' decedents were ignorant of the falsity of defendants' representations, the misrepresentations were a proximate cause of plaintiffs' decedents' untimely deaths and, in Count VII and VIII, that the defendant intended its members to act upon these misrepresentations.

The Union has moved for summary judgment asking the Court to dismiss Count V and VII on the basis the plaintiffs have failed to produce sufficient evidence of constructive or actual fraud. With this contention, the Court agrees.

The defendant sent the plaintiffs interrogatories requesting them to describe in detail the factual basis for their constructive fraud allegations. The plaintiffs responded by saying, "The complete answer to this interrogatory must await the completion of the depositions [of Steelworker's employees and agents] . . . ." Plaintiffs failed to identify one witness, fact or one document which supported their fraud allegation.

When this Court allowed the Plaintiffs to amend their complaint specifically setting forth the actual and constructive fraud counts, this Court agreed with plaintiffs' assertion the fraud counts were nothing other than a basic clarification of the factual allegations contained in the original complaint which was filed in 1973. In other words, the plaintiffs have had ten years to discover the facts and witnesses which would support their misrepresentation claims. If the plaintiffs are unable to produce any witnesses or facts other than the bare allegations of their pleadings, the Court can only conclude they never will be able to produce them.

Likewise, the plaintiffs' depositions are devoid of any testimony which would support the plaintiffs' fraud claims. In Tharon Rawson's deposition starting at page 31, and in Berniece Johnson's deposition starting at page 21, they were questioned regarding the fraud counts. This line of questioning revealed nothing which would substantiate the fraud counts. The wives were able to remember discussions with their husbands regarding their work in the mine but only in a vague, general way, resulting in no testimony which would establish the prima facia elements of a fraud claim. Laura Dunbar testified she was divorced from the defendant, Mr. Rossiter, before he was a member of the Union and she had no information as to Mr. Rossiter's relationship with the Union. (Dunbar deposition, p. 20). Most importantly, these depositions fail to establish the individual decedents relied on any alleged representations the Union made,

nor is there a single piece of testimony which would show the Union knew its representations were false and intended for plaintiffs to rely on these representations.

In contesting the motion for summary judgment, the plaintiffs have produced a number of documents which they say raise a question of fact as to their fraud claims. These documents include: the "Blue and Green books" (recommended safety and health programs), the International Union's Constitution and the Sunshine Mine/Steelworkers Collective Bargaining Agreement. These documents are of little help to plaintiffs' fraud claims. In and of themselves, they do not show the plaintiffs relied on these papers or that the statements in these documents are false. Apparently plaintiffs have underlined certain sections in these documents they think are pertinent. One underlined section reads:

> It involves a sense of determination of all concerned to see that safety programs and legislation are effectively implemented.
>
> Health and safety programs are going to be made or broken at the plant level, by how well our local unions and their safety and health committees do their job, and by the involvement of our individual members.

Statements like this, and others the plaintiffs have chosen to emphasize, establish nothing; they are not even statements of fact.

In contrast to the meager record created by plaintiffs, the Steelworkers have submitted the affidavits of Local 5089 President Laverne Melton and International Union Staff Representative Larry Marshall. In his affidavit, Laverne Melton discussed the operation of the joint safety and health committee created pursuant to the bargaining agreement. As local president, Melton was responsible for making appointments to the committee when vacancies occurred.

In exercising my authority to make the appointments, I was well aware that none of the rank-and-file members of Local 5089 were mining engineers or had other professional degrees or other background that qualified them as experts in mine safety. This was also a matter of common knowledge among the membership of Local 5089. Because none of the rank-and-file members were experts in mine safety, I knew that in carrying out their activities the committee members could only be expected to rely on their common sense and practical knowledge from their experience as underground miners. . . .

Because Local 5089 was a relatively small organization that functioned informally, members knew who the safety committeemen were and what was going on in the mine with respect to safety and health issues. . . .

I never represented or stated at any membership meeting or on any other occasion that the Union had any expertise in mine safety generally or in mine ventilation or evacuation systems in particular or, further that the membership should rely on the Union to guarantee or insure that no hazardous conditions of employment would exist at the Sunshine Mine . . . I never recall any member of the local safety committee ever making any such statements or representations at a meeting or for that matter on any other occasion. Indeed, the underground miners (including myself) who comprised the large majority of the membership were well aware from their own daily firsthand experiences in the mine not only that the Union had no authority to correct safety hazards but also how dangerous an occupation it was and, as well, how difficult it was to get this company to eliminate the hazards we faced.

Pursuant to the collective bargaining agreement, the company was obligated to "provide a sufficient num-

ber of printed copies of th[e] contract to enable each member of the local Union to secure a copy." (Art. IX, § 6). Each member had received a copy of the 1970 contract far in advance of May, 1972.

As noted, under the 1970 agreement, in any circumstances where the union safety committee members believed that a safety hazard existed which required abatement, their role under the agreement was limited to "advising with" and making "recommendations" to the plant manager "for his consideration." The Union had no authority to correct any safety hazard that it believed to exist and its recommendations were, by the express language of the agreement, subject to the final decision of the plant manager. The company retained the sole prerogative and the entire responsibility for determining what safety measures, if any, it would put into effect. (Based on my personal experience in dealing with the Sunshine management, I can state that this company was very difficult to budge; it closely guarded its managerial discretion and prerogatives —especially when a Union recommendation would require some substantial cost.)

When a motion for summary judgment is made and supported by affidavit an opposing party may not rest upon his pleadings but must respond by affidavit, deposition or interrogatory setting forth specific facts showing there is a genuine issue for trial. The plaintiffs have not submitted any evidence by deposition, affidavit or otherwise which would establish the plaintiffs' decedents relied on any alleged Union representations. The record is also bereft of evidence the defendant Union made misrepresentations of fact or that the defendant intended to defraud plaintiffs. On the other hand, the defendant has submitted testimony that the Union did not misrepresent its expertise; the Union members were aware the Union only acted in an advisory capacity and that the primary

responsibility for ensuring job safety lay with each individual Union member and the company. Summary judgment is granted defendant dismissing the fraud counts in plaintiffs' amended complaints.

B. DUTY

Plaintiffs seek to hold the Union responsible on negligence theories. A fundamental component of a negligence claim is the existence of a duty toward another. *Hoffman v. Simplot Aviation, Inc.*, 97 Idaho 32. 539 P.2d 584 (1975). A duty is a standard of conduct to which the defendant is required to conform. *Algeria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980). Plaintiffs rely on the collective bargaining agreement and RESTATEMENT (SECOND) OF TORTS, §§ 323 and 324A (1965), as the sources for the legal duty owed by defendant Steelworkers.

A breach of contract is not in and of itself a tort. A contract may, however, create a situation which furnishes the occasion for a tort. When a person renders services to another pursuant to a contract or otherwise, the law imposes a duty of care in the performance of those services. "The duty of care arises . . . irrespective of contract," and "[t]here must be a breach of duty apart from the non-performance of a contract." *Taylor v. Herbold*, 94 Idaho 133, 484 P.2d 664 (1971). Mere failure to carry out contractual obligations cannot support a tort action while misfeasance in the performance of contract obligations may support a tort action.

Plaintiffs complain the Union "failed to develop an adequate program for inspection and for safety, . . . failed to inspect," and "failed to require other safety devices to be used." Clearly the plaintiffs are upset with what the Union did not do, not with what it did do. Non-performance of alleged contractual duties will not sustain a tort claim.

The "Good Samaritan Doctrine" is enunciated in RESTATEMENT (SECOND) OF TORTS, §§ 323 and 324A. Section 324A reads:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for the physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if:
>
> (A) his failure to exercise reasonable care increases the risk of such harm, or
>
> (B) he has undertaken to perform a duty owed by the other to the third person, or
>
> (C) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Section 232 is substantially the same as 324A except it deals with the situation where an individual undertakes to render services directly to another person.

We start with the premise there is no duty to be a good Samaritan. The law will only hold a defendant liable if the plaintiff can meet the criteria layed down by RESTATEMENT. This Court has already held there is no proof the plaintiffs' decedents relied on the Union's safety activities. Therefore, the third possible criteria, that the harm is suffered because of reliance of the third person upon the undertaking, is not satisfied. Neither has the first criteria, i.e., the failure to exercise reasonable care increased the risk of harm, been met.

In *Clemente v. United States*, 567 F.2d 1140 (1st Cir. 1978), the plaintiffs sued over the death of Roberto Clemente and two other passengers and crewmen in a private airplane crash. The plaintiffs alleged Federal Aviation Administration employees had acted negligently

in failing to warn Clemente and other passengers the airplane was overweight and lacked a proper flight crew. The FAA had promulgated an internal order saying, "clear indication of alleged illegal flights should be made known to flight crew and persons chartering the service."

The appeals court held the defendant United States could not be held liable on the Good Samaritan theory.

> While the Federal Aviation Act empowered the administrative staff on the FAA to issue an order such as SO8430.20C, the act itself does not require this conduct. The agency, in issuing the order, was acting entirely gratuitously and was under no obligation or duty to plaintiffs' decedents or any other passengers.
>
> [T]he *Restatement of Torts (Second)*, §§ 323 and 324A n7 makes it clear that liability in such a situation must be predicated on one of three grounds: the conduct of the employee actually increased the risk of harm to the damaged firm; the harm to the damaged firm resulted from his reliance on the employee carrying out the inspection as ordered; or there existed a prior duty to inspect owed by the employer to the damaged firm. . . . . There was no underlying statutory duty to offer special protection to plaintiffs' decedents; the failure to inspect *in no way added to the risk* of injury to the passengers or crew; and there is no evidence that anyone relied on the contents of SO8430.20C and limited their own safety precautions accordingly. (emphasis supplied).

Like *Clemente*, the Union's alleged failure to inspect, warn and make safe did not increase the danger to the miners beyond that under which they were operating. The Steelworkers may not have helped the miners' safety problems, but they did not augment them either. See also *Blessing v. United States*, 447 F. Supp. 1160 (E.D. Pa. 1978). The Court notes the case at bar is also akin to

the *Clemente* case in that there is no evidence the rank-and-file Union members limited their own safety precautions because of Union activities.

Lastly, the defendant did not undertake to perform the safety functions owed by Sunshine Mine to the rank-and-file. The collective bargaining agreement clearly places the responsibility for making the work place safe upon Sunshine Mine.

> The company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment. . . .
>
> . . . Advice of the safety committee, together with supporting suggestions, recommendations and reasons shall be submitted to the plant manager for his consideration and for such action as he may consider consistent *with the company's responsibility to provide for the safety and health of its employees* during the working hours of their employment and the mutual objectives set forth in section 1. (emphasis supplied).

The collective bargaining agreement makes it very clear the primary responsibility for the rank-and-file members' safety and health was placed upon the company as opposed to the Union which could only act in an advisory capacity. The Union could talk all it wanted to but when it came right down to it, the Union was without authority to force any safety and health measure upon the company except in highly limited, and for our purposes here, irrelevant circumstances. Herein lies the central factor in this dispute. The technical requirements of the RESTATEMENT aside, it is fundamentally unfair to hold a party liable for a condition it did not create or worsen and which it had no jurisdiction to correct. Summary judgment is granted dismissing all of plaintiffs' negligence claims.

C. PRE-EMPTION

When this case was reviewed by the Idaho Supreme Court in *Dunbar v. United Steelworkers of America*, 100 Idaho 523, 602 P.2d 21 (1979), three justices joined in an opinion holding this action against the Steelworkers was not pre-empted by the National Labor Relations Act. The Union argued its only duty to those it represented was that of fair representation. The Supreme Court rejected this argument saying:

> If a union's unreasonable conduct results in the death of one of its members, it should not be excused from liability because of the legal fortuity of its organizational status any more than if its conduct brought death to a non-union member.

The Supreme Court distinguished *Bryant v. United Mine Workers*, 467 F.2d 1 (6th Cir. 1972) *Cert. denied* 410 U.S. 930, 93 Sup.Ct. 1370, 35 L.Ed.2d 592 (1973), from the *Dunbar* case.

> *Bryant* was also a case in which suit was brought by survivors of miners killed in a mine disaster. There the survivors claimed that the union had breached a duty created by the collective bargaining agreement regarding mine safety. In *Bryant* the collective bargaining agreement stated that the union "may inspect any mine." In affirming that judgment in favor of the defendants, the Court of Appeals stated that "[t]he use of the permissive 'may' rather than the obligatory language in the clause clearly negatives the possibility that any duty was created." 467 F.2d at 5. As noted by the Federal District Court in *House*, the agreement in the case at bar uses the words "shall inspect. . . ."

We are cited to no authority holding that it may be fairly inferred that Congress meant to deprive the states of their powers of determining litigation brought under the state's wrongful death statutes.

See *Helton v. Hake*, 386 F. Supp. 1027 (W.D. Mo., 1974).

With all due respect, this Court must disagree with the Supreme Court's holding in *Dunbar* and ask that higher court to reconsider its previous holding.[1]

The majority of courts considering the pre-emption issue in factual cases similar to the one here, have held the action was pre-empted by Federal Labor Law. See *House v. Mine Safety Appliances Co.*, 417 F. Supp. 939 (D. Idaho 1976); *Bryant*, supra. *Condon v. United Steelworkers of America*, 683 F.2d 590 (1982), the latest in this line of cases, is indicative of the majority position. *Condon* dealt with a Steelworker member who had received severe burns on his welding job. The collective bargaining agreement between plaintiff's employer and the defendant Union established a safety committee to advise the employer concerning safety and health matters but not to handle grievances. Plaintiff sued the Union alleging the joint safety committee failed to ensure there was sufficient fire safety equipment, breaching its duty of care by negligently performing its responsibility to monitor safety conditions. Plaintiff Condon admitted that with regard to all Union obligations eminating from the collective bargaining agreement, the only duty the Union owed its members was that of fair representation. Condon contended the Union was liable under the Good Samaritan

[1] Justices Donaldson and McFadden concurred in an opinion written by Justice Bakes which said the factual background of the case was not developed enough to make a determination as to whether the wrongful death action against the respondent union was pre-empted by federal law or not. But Justice Donaldson also concurred in the opinion authored by Justice Shepard. This makes it difficult to understand exactly what a majority of the Court is saying. This Court has decided not to utilize the difference between the majority and concurring opinion as a basis for its pre-emption discussion, rather choosing to discuss the majority opinion written by Justice Shepard.

Doctrine, a duty arising independently of the Union's collective bargaining agreement obligations.

The appellate court rejected the plaintiff's argument, saying:

> The collective bargaining agreement cannot so cavalierly be pushed aside. Without the collective bargaining agreement, there would be neither a local union nor a union safety committee. State law in this area, of necessity operates in the penumbra of the National Labor Relations Act in federal law.

The *Condon* Court reasoned the plaintiff's cause of action flowed from the contractual obligations undertaken by the Union to benefit its members and their working conditions and their duties arose from and were governed by federal law. The case was distinguished from those cases where a tort action against a union has been permitted.

> [F]ederal law would pre-empt imposing [a state law duty] unless it could be shown to arise wholly outside the ambit of those obligations circumscribed by a union's duty of fair representation under the collective bargaining agreement; that is, unless it involved union activity that was peripheral to the concern of the applicable federal statutes and presented a tangential or remote potential conflict with the federal regulatory scheme. This exception has been applied to state law claims where the union has engaged in affirmative improper conduct independent of the collective bargaining agreement such as union's infliction of severe emotional distress on a member by its intentional and outrageous conduct, or malicious libel. *This is obviously not such a case.* (Citations omitted; emphasis supplied).

No matter how the plaintiffs couch their arguments, they are attempting to hold the defendant liable for conduct of an advisory safety committee created and defined by the collective bargaining agreement. The plaintiffs are complaining about the manner in which the Union carried

out the collective bargaining agreement, essentially saying the Union advisory committee should have done more. This is obviously a question of the Union's representational duties and these representational duties are governed by the National Labor Relations Act. Nothing could be more telling than the very documents the plaintiffs have used in opposing this motion for summary judgment. They have attached the first and second editions of a model safety and health program promulgated by the national Union. The "blue and green books" are negotiating guidelines, setting forth safety and health contract language the local negotiators may put into their contracts. The plaintiffs say the local collective bargaining agreement did not have as strong a safety and health clause as proposed by the "blue and green books." The plaintiffs are now suggesting the defendant should be held liable because it did not negotiate a better agreement at the collective bargaining table. What could be more clearly governed by federal labor law! The plaintiffs also rely on the collective bargaining agreement itself in contesting the summary judgment motion. This only illustrates once again, they are attempting to hold the defendant liable on the basis of its representational duties. This area is pre-empted by federal law and the facts of this case, like the facts of the *Condon* and *Bryant* cases, do not come under one of the recognized pre-emption exceptions.

This case does not involve a collective bargaining agreement whereby the Union assumed management safety responsibilities and therefore management's common law duties. In *Helton v. Hake*, 564 S.W.2d 313 (Mo. 1978), decided four years after *Helton v. Hake*, 386 F. Supp. 1027 (W.D. Mo. 1974), the collective bargaining agreement provided the union steward would ensure no work was done in the immediate area of high tension lines. The agreement distinctly said the employer was in no way responsible for the performance of these safety functions by the steward. Norman Helton was killed when he came

in contact with a high voltage power line, causing his electrocution. Plaintiff, decedent's wife, brought suit against the Union. The *Helton* Court first distinguished the *Bryant v. International Union U.M.W. of America* and *House v. Mine Safety Appliances Co.* cases. As noted by the Missouri Court of Appeals, both these cases dealt with situations where the Union acted in a safety advisory capacity:

> We can readily agree that when a union assumes only an advisory capacity with respect to safety and the enforcement of safety regulations so far as the union is concerned is limited only to the usual grievance machinery, then the union is carrying out purely a representative function on behalf of its members and should be limited in its responsibility to performing that representation in a fair and honest manner. . . .
>
> Here, however, the union has chosen to go far beyond a mere advisory status of representative capacity in the processing of grievances. Rather, it has taken for itself a managerial function, namely the full independent right to enforce safety requirements. With its demand for and successful acquisition of that management right, it must also accept the concommitant responsibility. Under the terms of this particular collective bargaining agreement, the safety responsibility assumed by the union is separate and distinct from the normal and usual duties of a purely representative nature such as those involved in the processing of grievances.

This Court could not agree more with the Missouri Appellate Court. When the Union takes actual authority for enforcing safety conditions on the work site away from management, it should be held responsible for breaches in a duty of care just as management would have been at common law. The defendant Union's collective bargaining agreement with Sunshine did not allow the Union to enforce safety measures. The Sunshine/

Steelworkers' contract did say the Union "shall inspect" but the Union could do nothing but advise once it had been reported. Though the collective bargaining agreement uses the word "shall," the word "shall" is simply a red herring which in and of itself has no meaning when considered in the total context of the safety clause.[2] This case is therefore undistinguishable from the *House* and *Bryant* cases which the Missouri Court cites with approval and indistinguishable from the subsequent *Condon* case. The *Helton* case is a persuasive case and contrary to the position taken by the Idaho Supreme Court in 100 Idaho 523. This Court again respectfully requests the Supreme Court to re-examine its holding that this case is not pre-empted by federal labor law.

This case has wound its way around the legal system for eleven years on heartbreaking, but legally insufficient facts. It is time the long travail of both sides was ended. Summary judgment is granted the defendant dismissing plaintiffs' amended complaints. Counsel for defendant will prepare the Judgment. Each side will bear their own attorney's fees. Costs to defendant. IT IS SO ORDERED.

DATED this 1st day of Nov., 1983.

s/ Watt E. Prather
WATT E. PRATHER
District Judge

Copies to:

George H. Cohen
Wayne Fuller
Lloyd Webb
Robert J. Cartwright
Frederick Betts
Bruce O. Robinson
Kenneth Howard

[2] Laverne Melton's affidavit is uncontroverted that the safety committee did indeed inspect various sections of the mine pursuant to the collective bargaining agreement.

APPENDIX E

1979 Opinion No. 126

IN THE SUPREME COURT OF THE STATE OF IDAHO

Coeur d'Alene October 1977 Term

Filed: Sep. 13, 1979

R. H. Young, Clerk

Nos. 12228, 12229, 12230 and 12231

LAURA DUNBAR, *et al.*,
MARY WOOD, *et al.*,
BERNICE JOHNSON, *et al.*,
THARON RAWSON, *et al*,
Plaintiffs-Appellants,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association;
and STATE OF IDAHO,
Defendants-Respondents.

Appeal from the District Court of the First Judicial District of the State of Idaho, Shoshone County. Honorable James G. Towles, District Judge.

Consolidated appeals from summary judgments in favor of defendants in wrongful death actions. *Affirmed* in part and *reversed* in part.

Bruce O. Robinson, Nampa; May, May, Sudweeks & Fuller, Twin Falls; Matthews & Lee, Boise; Thomas A.

Mitchell, Coeur d'Alene; Elie Rapaich, Lewiston; Cartwright, Saroyan, Martin & Sucherman, Inc., San Francisco, California; Philo, Maki, Cockrel, Robb, Spearman & Cooper, Detroit, Michigan; Burgess, Joyce, Prothero, Shelman & O'Leary, Butte, Montana; and Lloyd J. Webb, of Webb, Burton, Carlson & Pedersen, Twin Falls, for appellants.

Honorable Wayne L. Kidwell, Attorney General, State of Idaho; Peter C. Jenkins, Special Assistant Attorney General, State of Idaho; George H. Cohen, of Barr, Gottesman, Cohen & Perr, Washington, D.C.; Eberle, Berlin, Kading, Turnbow & Gillespie, Chtd., Boise; Wayne P. Fuller, of Fuller & Radke, Caldwell; Michael E. McNichols, Orofino; David L. Gore, Chicago, Illinois; Frederick V. Betts and Paul D. Carey, of Skeel, McKelvy, Henke, Evenseon & Betts, Seattle, Washington; and Kleiman, Cornfield & Feldman, Chicago, Illinois, for respondents.

SHEPARD, J.

These are appeals from orders of summary judgment entered by the trial court in favor of both defendants, the United Steelworkers of America and the State of Idaho. As to the State, the court held that the activity upon which plaintiffs base their claim fell within the discretionary act exception to the Idaho Tort Claims Act. I.C. § 6-904. As to the Union, the court held that plaintiff's claim was preempted by the federal regulation of labor law. Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971). We affirm the trial court's order for summary judgment as to the State, but reverse the trial court's order of summary judgment as to the Union.

The Coeur d'Alene Mining District is located in northern Idaho near Kellogg and Wallace, Idaho. Therein are located a number of "hard rock" mines, the shafts in some of which extend 6,000 feet below the surface and some of which contain up to 125 miles of underground

tunnels and workings. The Sunshine Mine is one of such workings and is the largest producer of silver and antimony in the United States. On May 2, 1972, some 200 miners were at work in the mine when a fire broke out which claimed the lives of 91 of those workmen. Survivors of deceased miners brought these actions for wrongful death, which were consolidated for appeal.

I.

As to the Union, plaintiffs allege negligence on the part of the Union in that it undertook to act as accident prevention representative and enforcer of the "company-employees" agreement. It was asserted that the Union misrepresented its safety concern and expertise; that it failed to develop an adequate safety program for its members; that it undertook to inspect and enforce the accident prevention clauses of the company-employees contract and did so negligently in failing to require fire drills, personal protective equipment, adequate protection against spontaneous combustion, adequate emergency egress and failed to require evacuation on evidence of smoke.

For emphasis, we reiterate that this appeal is from the orders of summary judgment issued by the trial court solely on legal theories under which the character of the two defendants, the Union and the State, were held to bar plaintiff's recovery.

We begin our analysis with the argument advanced by the Union and adopted by the trial court, *i.e.*, the jurisdiction of the courts of Idaho to hear and adjudicate plaintiff-appellants' claim against the Union is preempted and superseded by the pervasive federal regulation of labor law and that such matters are committed exclusively to the primary jurisdiction of the National Labor Relations Board.

In Ray v. Atlantic Ritchfield Co., 435 U.S. 151 (1978), it is stated:

> "The Court's prior cases indicate that when a State's exercise of its police power is challenged under the Supremacy Clause, 'we start with the assumption that the historic police powers of the States were not to be susperseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" 435 U.S. at 157.

Quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). The preemption of state law or of state court jurisdiction is not to be readily inferred. Malone v. White Motor Corp., 435 U.S. 497 (1978).

The primary philsophy of the United States Supreme Court in the labor law preemption area was announced in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). There the Court said:

> "In determining the extent to which state regulation must yield to subordinating federal authority, we have been concerned with delimiting areas of potential conflict; potential conflict of rules of law, of remedy, and of administration. • • • We have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal, the other state, of inconsistent standards of substantive law and differing remedial schemes." 359 U.S. at 241-42.

In come [sic] cases the desire to avoid the conflicts delineated in *Garmon* has led the Court to declare that some matters are committed exclusively to the primary jurisdiction of the National Labor Relations Board, and states, and *a fortiori* state courts, are without jurisdiction to regulate or hear the disputes. Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976); San Diego Bldg. Trades Council v. Garmon, *supra*. In other cases, however, the Court has held that state courts have concurrent

jurisdiction. Vaca v. Sipes, 386 U.S. 171 (1967); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

A substantial factor as to whether state courts are ousted from all jurisdiction or share concurrent jurisdiction appears to be whether the activity involved is "arguably subject to paragraph 7, paragraph 8 of the [National Labor Relations] Act." San Diego Bldg. Trades Council v. Garmon, 359 U.S. at 245. In *Garmon*, the Court stated:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8 [29 U.S.C.A. § 158 (a)-(b)], due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes." 359 U.S. at 244.

That language continues to be viable and has been quoted on several occasions since *Garmon*. *See* Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977); Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Comm'n, *supra*; Motor Coach Employees v. Lockridge, *supra*.

It is the Union's position that the claims of plaintiffs-appellants are based on the breach of the duty of fair

representation. Humphrey v. Moore, 375 U.S. 335 (1964). That being the case, the Unions argue, federal labor law must be applied even when the case is brought in state court. Vaca v. Sipes, 386 U.S. 171. The Union's argument continues that the plaintiffs-appellants must show that the Union discriminated against the deceased Union members in order to prove a breach of the duty of fair representation, Motor Coach Employees v. Lockridge, *supra*, and since the plaintiffs-appellants have not made such a showing, summary judgment was properly entered in favor of the Union. We disagree. Plaintiffs-appellants' claims are not necessarily based on the violation of the duty of fair representation and such is not the only duty owed by a union to its members. Further, we believe that even assuming the claims of plaintiffs-appellants fall within the general scope of the doctrine of preemption, nevertheless we deem it clear that the case also falls within the narrow exceptions to that same preemption doctrine which were described in Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977).

The duty of fair representation has never been carefully or precisely defined and its contours appear vague but, a fair summation of it is that it is designed "to enforce fully the important principle that no individual union member may suffer invidious, hostile treatment at the hands of the majority of his coworkers." Motor Coach Employees v. Lockridge, 403 U.S. at 301. *See* Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 Tex. L. Rev. 1119 (1973); Cox, *The Duty of Fair Representaiton*, 2 Vill. L. Rev. 151 (1957); Rosen, *Fair Representation, Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining*, 15 Hastings L.J. 391 (1964).

In Steele v. Louisville & N. R.R., 323 U.S. 192 (1944), the Court held that the exclusive statutory agent of bargaining unit employees could not discriminate on the basis of race. The Court stated:

> "Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes as their representative, the minority would be left with no means of protecting their interests or, indeed, their right to earn a livelihood by pursuing the occupation in which they are employed. While the majority of the craft chooses the bargaining representative, when chosen it represents, as the Act by its terms makes plain, the craft or class, and not the majority. The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. • • •
>
> We think the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. J.I. Case Co. v. Labor R. Board, [321 U.S. 332, 335], but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."

323 U.S. at 201-03. *See* Vaca v. Sipes, *supra*; Wallace Corp. v. National Labor Relations Bd., 323 U.S. 248 (1944).

The duty of fair representation has been extended to other forms of arbitrary discrimination beyond that of race alone, but insofar as we are cited authority, the duty of fair representation retains its fundamental character as a protection against invidious discrimination by the majority of a bargaining unit against a minority. Motor Coach Employees v. Lockridge, *supra*; Humphrey v. Moore, *supra*. We are cited to no authority which indicates that the duty of fair representation encompasses or displaces those duties created by a state law which requires a person, corporation or an unincorporated association, to refrain from engaging in wrongful conduct which results in death or injury to person or property.

The Union here urges that the "only" duty owed by a union to those it represents is that of fair representation. We disagree. We are cited to no authority, for example, which insulates a union for its negligent and tortious conduct toward one of its members, *i.e.*, if a member of a union was struck by a motor vehicle owned by the union and operated by one of its officials during the course of his employment for the union, we cannot believe the union would be insulated from liability on the basis that the only duty it owed toward its members was that of fair representation. If a union's unreasonable conduct results in the death of one of its members, it should not be excused from liability because of the legal fortuity of its organizational status anymore than if its conduct brought death to a nonunion member.

The Union urges the application of the decision of House v. Mine Safety Appliances Co., 417 F. Supp. 939 (D. Idaho 1976), decided by the United States District Court for Idaho, arising out of the same Sunshine Mine tragedy. That federal court relied in part upon the very trial court decision which is the subject of this appeal. We are not bound by the federal court's determination and its decision is, at best, only persuasive.

The court in *House* advanced another reason for its determination that the negligence action was preempted. It relied upon Bryant v. United Mine Workers, 467 F.2d 1 (6th Cir. 1972), *cert. denied*, 410 U.S. 910 (1973). *Bryant* was also a case in which suit was brought by survivors of miners killed in a mine disaster. There the survivors claimed that the union had breached a duty created by the collective bargaining agreement regarding mine safety. In *Bryant* the collective bargaining agreement stated that the union "may inspect any mine." In affirming that judgment in favor of the defendants, the Court of Appeals stated that "[t]he use of the permissive 'may' rather than obligatory language in the clause clearly negatives the possibility that any duty was to be created." 467 F.2d at 5. As noted by the federal district court in *House*, the agreement in the case at bar uses the words "shall inspect."

We hold that a material issue remains in existence in the case at bar regarding whether or not the Union had a duty to inspect and the alleged breach of duty. In the case at bar that question was never reached since the trial court held that the cause of action was preempted by the federal duty of fair representation. This case, therefore, is clearly distinguishable from *Bryant*.

We believe the interests protected by state wrongful death statutes are unrelated to those governed by federal labor laws and we ascertain no conflict which will necessarily arise between the state and federal authorities as a result of permitting such traditional litigation in the state courts. We are cited to no authority which would permit the National Labor Relations Board to take cognizance of wrongful death claims against unions. We are cited to no authority holding that it may be fairly inferred that Congress meant to deprive the states of their powers of determining litigation brought under state wrongful death statutes. *See* Helton v. Hake, 386 F.

Supp. 1027 (W.D. Mo. 1974); W. Prosser, Law of Torts § 127 (4th ed. 1971).

We now turn to the assumption that preemption in a general term might apply notwithstanding the above discussion. We are of the opinion that even if the doctrine of preemption should apply in general terms, nevertheless this case falls within those exceptions to the doctrine of preemption previously announced by the United States Supreme Court. *See* Farmers v. United Brotherhood of Carpenters, 430 U.S. at 296-301. In *Farmers* a state claim was asserted by a union member against the union for the infliction of severe emotional distress by intentional and outrageous conduct. The Court in *Farmers* held that such was an exception to the preemption rule. Other activities which the Supreme Court has determined to be exceptions to the general preemption rule include malicious libel, Linn v. Plant Guard Workers, 383 U.S. 53 (1986); mass picketing and threats of violence, United Automobile Workers v. Russell, 356 U.S. 634 (1958); and wrongful expulsion from union membership, Machinists v. Gonzales, 356 U.S. 617 (1958). *See also* Sears Roebuck v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978).

As noted in *Farmers*, exemptions or exceptions to the preemption doctrine should reflect an inquiry into the nature of the federal and state interest in regulation and the potential for interference with federal regulation or whether the potential for conflict with the federal scheme is "tangential and remote." Here the federal interest is tangential at best. And we see no possibility that the federal labor laws will be thwarted by requiring the Union to answer in state court to the claim that it wrongfully caused the death of these survivors' decedents.

We reverse the summary judgment of the district court as to the respondent Union and remand that portion of the cause for further proceedings.

II.

Plaintiffs' claims against the State of Idaho are brought under the provisions of I.C. § 6-904, which is denominated the Idaho Tort Claims Act and is a legislative waiver of the State's otherwise sovereign immunity. It was and is the assertion of the State and summary judgment was granted the State on the basis that plaintiffs' claims were barred by that portion of I.C. § 6-904 which provides that the State shall not be liable for any claim arising out of or "based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused."

At the time of the accident and the time of the filing of this action, the Idaho statutes provided for the office of Inspector of Mines for the State of Idaho. That official was required to visit each mine in the State of Idaho at least once each year for the purpose of determining the conditions as to safety and health and to promulgate reasonable rules and regulations for safety and health of employees therein after consultation with the State Mine Safety Advisory Board. [Those statutes, I.C. § 47-101, *et seq.*, were repealed and the same duties essentially transferred to the Department of Labor and Industrial Services and the Director thereof. 1974 Idaho Sess. Laws, Chapters 39 and 119, now codified as I.C. §§ 44-101, *et seq.*] Those statutes also authorized the inspector to enter mines to inspect for compliance with safety regulations and to notify the operator thereof of any violations. The statute required the operator to correct conditions of noncompliance and failing to do so, the inspector might issue an order closing the mine or portions thereof. General sanctions could be applied for failure of compliance with such orders.

At the time of the fire, there was in effect, adopted December 1971 Minimum Safety Standards and Practices

for the Mining and Mineral Industry. [Safety Code 5]. Portions of that Safety Code 5 relevant to our consideration here are:

Paragraph 2:3 of this code provides as follows:

> "In this code numerous general expressions are used, such as safe, adequate, substantial, proper, etc., particularly in reference to safeguards. By such terms it is the intention to specify available articles and attainable conditions in accordance with good standard practice in the industry and to avoid makeshifts.
>
> In the first instance the determination of what is reasonable, safe, adequate, substantial, etc., is the *prerogative* of the inspecting official. In making such determination, the inspector must consult and consider the standards fixed or approved by recognized authorities, or applicable Idaho State Safety Codes, which are not in conflict with the regulations set forth herein.
>
> In cases of doubt or involving dispute, the advisory services of the State Inspector of Mines are available. Where time permits, approval by him of new or untried devices should be sought in advance." (Emphasis added.)

Regulation 2:4(A) reads as follows:

> "When compliance with any of the provisions of this code appears impracticable or unreasonable the State Inspector of Mines may, upon application in writing, permit modifications of the requirements when protection substantially equivalent to that required by this code has been provided. Such application shall set forth in full detail the reasons for requesting such modification. Any modification granted shall be limited to the particular case covered by the application for modification. Authorization for modification shall be in writing and shall be on file at

> the property with respect to such modification as allowed. Any such modification shall be revocable after due and reasonable notice in writing to the employer."

Plaintiffs-appellants asserted liability of the State in that it "undertook, pursuant to the Idaho statutes, to inspect and enforce safety in the aforementioned mine and failed to enforce an elementary accident prevention program * * *" by failing to require fire drills, safety meetings, mine evacuation upon discovery of smoke, adequate personnel protective equipment and adequate emergency means of escape. Plaintiffs-appellants also asserted negligence in that the Governor allegedly failed to give adequate chief executive supervision and direction to the State Mine Inspector; that the Governor was negligent in approving the appointment of a mine inspector who lacked the necessary qualifications to adequately handle the office; that the mine inspector and his deputies were negligent in inspecting the mine in accordance with Safety Code 5 in the above and additional matters.

Upon motion therefor the district judge granted summary judgment in favor of the State holding that the acts alleged and asserted by plaintiffs-appellants fell within the purview of the discretionary act exemption to the Idaho Tort Claims Act.

That portion of the Idaho Tort Claims Act exempting from liability "a discretionary function or duty" has not been previously construed by this Court. That language, however, was clearly adopted from the federal Tort Claims Act, 28 U.S.C. § 2680(a) (1970). The interpretation and construction of a federal act by federal courts, while not binding, is persuasive. Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply Co., 98 Idaho 495, 567 P.2d 1246 (1977); State v. Miles, 97 Idaho 396, 545 P.2d 484 (1976).

The first significant interpretation of the discretionary act exemption under the federal statute was announced in Dalehite v. United States, 346 U.S. 15 (1953). That case arose from a fire and explosion in a Texas port which killed more than 500 persons. The disaster resulted from a federal government decision to produce and export a highly volatile fertilizer. The Court interpreted the legislative history of the act and concluded that the government should not be subject to liability arising from acts of a governmental nature or function. The Court further said:

> "It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." 346 U.S. at 35-36. (Footnote omitted.)

Three members of the Court dissented in *Dalehite*. Thus, with two members of the Court not participating, the decision resulted in a 4-3 split of the sitting members of the Court.

The majority opinion states "[S]ince no individual acts of negligence could be shown, the suits for damages that resulted necessarily predicated government liability on the participation of the United States in the manufacture and the transportation of FGAN [ammonium nitrate fertilizer]." 346 U.S. at 23. However, as pointed out, specific allegations of negligence on the part of the government were asserted by plaintiffs, *i.e.*, that the material was an inherently dangerous and hazardous ex-

plosive and fire hazard; that a coating rendered the material highly susceptible to fire or explosion; that the material was placed in bags which were easily ignited by contact with fire or by spontaneous combustion; that the material was packed at high degrees of temperature which rendered the material more susceptible to fire and explosion; that said high temperature continued by reason of the method of packaging while the material was shipped; that the sacks of the material were not labeled or marked as explosive and as a fire hazard as required by the rules and regulations of the Interstate Commerce Commission; and that common carriers of the material were not advised of the dangerous nature and character of the material.

As well pointed out by the dissent, "The fertilizer had been manufactured in government-owned plants at the Government's order and to its specifications. It was being shipped at its direction as part of its program of foreign aid." 346 U.S. at 48 (Jackson, J., dissenting). Hence, we note that the manufacturing operation was operated and controlled by the government entity sought to be held liable, and the product resulting from said operation was placed into commerce by the government. Further, we note that the manufacture, packaging and shipping of a fertilizer product is not an activity completely foreign to the sector of private business as contrasted with a governmental activity for which there is no corollary in the private sector.

The majority opinion nevertheless comments on "the specific acts of negligence" and argues that each of the specific acts was the result of some "discretionary" determination and thus could not constitute negligence. With all respectful deference to our brethren on the high Bench, we suggest that such reasoning or terminology provides no realistic answer as to what constitutes a "discretionary function." It seeks to insulate the government from liability for specific acts of negligence by

stating that the decision to be negligent or careful involves discretion, and hence the negligence is not actionable. Such treatment provides no answer to the question of whether a duty was owed which was breached and which resulted in damage to another.

As we deem well said by the dissent:

> "The Government, as landowner, as manufacturer, as shipper, as warehouseman, as shipowner and operator, is carrying on activities indistinguishable from those performed by private persons. In this area, there is no good reason to stretch the legislative text to immunize the Government or its officers from responsibility for their acts, if done without appropriate care for the safety of others. Many official decisions even in this area may involve a nice balancing of various considerations, but this is the same kind of balancing which citizens do at their peril and we think it is not within the exception of the statute.
>
> The Government's negligence here was not in policy decisions of a regulatory or governmental nature, but involved actions akin to those of a private manufacturer, contractor, or shipper. Reading the discretionary exception as we do, in a way both workable and faithful to legislative intent, we would hold that the Government was liable under these circumstances." 346 U.S. at 60 (Jackson, J., dissenting).

In an appropriate case involving the Idaho Tort Claims Act, we would undoubtedly be constrained to agree with the dissenters in *Dalehite* on the basis that the manufacturing operation was carried out by the government and the product was the result of that manufacturing operation as was the packaging and the shipment and the placing of the product into the stream of commerce; the activity carried out by the government was "akin to

those of a private manufacturer, contractor, or shipper." *Id.*

In what was perhaps dictum, the majority in *Dalehite* also held that an allegation of negligence on the part of the government in fighting the fires which resulted from the explosion did not support a cause of action, citing Feres v. United States, 340 U.S. 135 (1950).

A scant two years later the dissenters of *Dalehite* appear to have prevailed in Indian Towing Co. v. United States, 350 U.S. 61 (1955). There liability was sought to be imposed on the government for negligent failure to maintain a lighthouse with the result that a ship and barge went aground and were damaged. The Court in a relatively short opinion bottomed its opinion on the "Good Samaritan" theory and said:

> "The broad and just purpose which the statute [Tort Claims Act] was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable • • •." 350 U.S. at 68.

The Court held neither *Feres* nor *Dalehite* applicable to the decision in *Indian Towing*, stating only, "The differences between this case and *Dalehite* need not be labored. The governing factors in *Dalehite* sufficiently emerge from the opinion in that case." 350 U.S. at 69 (footnote omitted.).

Again, with all deference, we cannot accept the rationale of the majority opinion in *Indian Towing*. While the activity or lack of activity which allegedly caused the damage involved a facility which was government owned and operated, we cannot agree that there is or could be a parallel between the government being held to the same liability as a private person since, as pointed out, all but the government are expressly prohibited from maintaining lighthouses.

With some language of the Court in *Indian Towing*, we are however, in total agreement, to-wit: that the "discretionary act" exemption to the Tort Claims Act invites the drawing of "distinction so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation." 350 U.S. at 68.

Less than two years thereafter the Court by a 7-2 majority delivered an opinion in Rayonier, Inc. v. United States, 352 U.S. 315 (1957). There the United States owned certain land through which it permitted a railroad to operate, and as a result thereof a forest fire was ignited which was fought by forest service personnel. It was alleged that the fire was improperly controlled and thus damaged the plaintiffs. Although not clear, it is probable that those portions of *Dalehite* and *Feres* dealing with immunity from the negligence of firefighters were overruled. Again, we note that the facility involved was owned, controlled and operated by the government and the negligence which was the immediate cause of the damage without any intervening factors was that of government employees. As in *Indian Towing*, the Court in *Rayonier* made no substantial effort to define the scope of the "discretionary act" exemption to the Tort Claims Act, other than obviously negligent fighting of fires by government employees is not within the ambit of the exception.

It was said in the *Dalehite* dissent:

> "This is one of those cases that a judge is likely to leave by the same door through which he enters. As we have been told by a master of our craft, '*Some* theory of liability, some philosophy of the end to be served by tightening or enlarging the circut of rights and remedies, is at the root of any decision in novel situations when analogies are equivocal and precedents are silent.'" 346 U.S. at 49 (Jackson, J., dissenting) (Footnote omitted).

So it is with our reading of those decisions of the United States Supreme Court in the area of "discretionary act exemption." We leave them no wiser and find no clear theory or philosophy as to the meaning or application of the "discretionary act" exemption to the Tort Claims Act which is common to the federal and Idaho legislation.

We have reviewed decisions of the lower federal courts dealing with the discretionary function as an exemption to liability otherwise imposed by the federal Tort Claims Act. Such review also fails to engender assistance in the areas of either legislative intent or policy guidelines.

Martin v. United States, 546 F.2d 1355 (9th Cir. 1976), was an action under the federal Tort Claims Act based on a death resulting from a grizzly bear attack in Yellowstone National Park. The Court therein concluded, as in *Dalehite*, that a decision as to the administration of the park area which might result in grizzly bears invading camp ground areas was a high level policy determination which fell at the planning level, rather than the operational level. The Court in *Martin* also found no credible evidence that the government had failed to warn of a dangerous condition, which appears to have been the sole possible source of liability of the government. Such may explain in part that court's willingness to find that the government's activities were at the planning level, therefore discretionary and therefore exempt from the tort claims coverage. Nevertheless, we would undoubtedly disagree with that court's finding as it relates to the discretionary function. Although Yellowstone Park is admittedly a vast expanse of land and animals, it is not substantially different in its nature than wild animal parks which might be operated by private persons or entities. The decedent might have been construed to be an invitee. Hence, we see no reason not to apply the same standard of care to the government as we would apply to such an enterprise operated by non-

government persons. If in the context of the management of a privately owned business, we would undoubtedly hold that the fact that a decision was made by a high level corporate officer on the planning level, rather than by a relatively low level animal trainer employee in his day-to-day operations would be irrelevant. As to the existence of a duty between the owners or operators of a facility and an invitee, we would undoubtedly hold for a plaintiff and the existence of a duty.

In contrast to *Martin*, less than one year later the same Ninth Circuit decided McGarry v. United States, 549 F.2d 587 (9th Cir. 1976). That claim resulted from the death of an employee of a company under contract with the government to drill exploratory holes on an Atomic Energy Commission test site. While so working, the equipment struck electrical wires and the employee was killed. It was there argued that the decision to install automatic reclosure on the electrical lines, which resulted in decedent's death, was a planning level decision, as contrasted with an operational decision, and, therefore, constituted a discretionary function, exempting liability under the Tort Claims Act. In *McGarry* the court noted, "We find no error in imposing this duty of care under the circumstances of this case. The power line was owned by the United States. It was to be contemplated that contractors would engage in work in its neighborhood, and the AEC here was aware of the location of the exploratory hole." 549 F.2d at 590. If presented with a *McGarry* situation, we would undoubtedly hold the government duty no different than that owed in the private sector. We would not be concerned with the level at which the decision might be made as to the operation of power lines, but rather whether there had been a breach of duty to persons who could reasonably be expected to be in the vicinity of a power line.

In J.H. Rutter Rex Manufacturing Co. v. United States, 515 F.2d 97 (5th Cir. 1975), suit was filed for

damages resulting to the plaintiff by reason of an unreasonable delay by the National Labor Relations Board in closing a back pay labor dispute case. The court in a brief and cryptic opinion decided that the decision of the NLRB "clearly involved public policy considerations—balancing of various cost-benefit considerations to advance the public interest." 515 F.2d at 99. There could be drawn from *Rutter* the seminal thread leading to argument that the government should not be liable as a result of activities for which there is no parallel in the private sector and Tort Claims Acts were designed to provide liability as to the government only when a comparable liability and duty would exist in the private sector. Such, however, is not expressly discussed in the *Rutter* opinion.

Smith v. United States, 375 F.2d 243 (5th Cir. 1967), was also a decision of the Fifth Circuit. Smith sat as a juror in a federal court civil rights damages suit. He alleged that as a result of his service on the jury and their verdict, civil rights groups conspired against his business and the picketing and boycott resulting therefrom destroyed his business. He alleged that the failure of the government to arrest and/or prosecute those persons for the crime of intimidation of a federal juror resulted in the accrual of a cause of action against the government. The court in *Smith* appears to reject the planning-operational dichotomy in determining whether the function performed is "discretionary" under the Tort Claims Act. The court said:

> "Cases under the Act therefore put courts to the question of what sorts of decisions can be classified as resulting from discretion within the meaning of § 2680(a). It is not a sufficient defense for the government merely to point out that some decision-making power was exercised by the official whose act was questioned. Answering these questions, a difficult process, is not aided by importation of the plan-

ning stage-operational stage standard as argued for by Smith. Such a distinction is specious. It may be a make weight in easy cases where of course it is not needed, but in difficult cases it proves to be another example of a distinction 'so fine spun and capricious as to be almost incapable of being held in the mind for adequate formulation.'" 375 F.2d at 246.

The Court in *Smith* implicitly appears to be saying that where certain functions of government have no parallel in the private sector "an official exerts governmental authority in a manner which legally binds one or many, he is acting in a way which no private person could." (Jackson, J. dissenting in *Dalehite.*) The discretionary function exemption prevents the diffusion of governmental power into private hands. The Court in *Smith* went on to say:

> ". . . The discretion of the Attorney General in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute.
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> • • •
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> The national wellbeing has been in the balance during the recent struggle for racial equality, of which the present action is a piece. The federal government's decisions concerning enforcement of its criminal statutes comprise a part of its pursuit of national policy. If the government could be held liable for prosecuting or failing to prosecute such a case, its choices in this area could quite conceivably be affected by such a suit. Thus, a policy decision of the federal government might be influenced by a plaintiff with no governmental responsibility." 375 F.2d at 247.

The case of United States v. DeCamp, 478 F.2d 1188 (9th Cir. 1973), is similar in some respects to McGarry v. United States, *supra*, however, with important distinctions. In *DeCamp* action was brought under the Tort Claims Act for a death occurring while decedent was the

employee of a company under contract with the Army Corps of Engineers. He was a bull-dozer operator who was killed as a result of the absence of a canopy on the bulldozer which would otherwise have prevented his death. The court approved a lower court finding of non-negligence of the employer for failure to equip the tractor with a canopy. The court stated:

> "In California a private person would assume no tort duty by reaching this conclusion [not to equip tractors with canopies] and the government engineer cannot be held to a higher standard." 478 F.2d at 1193.

Although Estrada v. Hills, 401 F. Supp. 429 (N.D. Ill. 1975), was an action brought against federal officials rather than the United States Government, we deem the language to be indicative of the groping by the courts in interpreting the discretionary function exemption to the Tort Claims Act. There it was alleged that the federal officials had maintained a building in hazardous condition which led to a fire and caused the plaintiff's adjacent building to be destroyed. The court said:

> ". . . One source of guidance useful here, however, is the explanation of the discretionary-ministerial distinction developed in the context of the Federal Tort Claims Act. • • • Generally speaking, a duty is discretionary if it involves judgment, planning or policy decisions. It is not discretionary if it involves enforcement or administration of a mandatory duty at the operational level, even if some degree of professional expert evaluation is required. [Citations omitted.] The key is whether the duty is mandatory, and whether the act complained of involved policy-making or judgment. For example, negligence in the construction of a government facility is nondiscretionary and subjects the Government to liability under the Federal Tort Claims Act. [Citations omit-

ted.] On the other hand, the Government is not liable under the Federal Tort Claims Act for actions based on the exercise of discretion, even if that discretion is abused." 401 F. Supp. at 436.

One of the more often cited cases is Eastern Air Lines, Inc. v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955), (*affirmed Per Curiam* 350 U.S. 907.) There it was alleged that negligent instructions given by air traffic controllers who were federal employees resulted in the crash of a military plane and an airliner. The court recognized that the principal question presented was whether the United States had consented to be sued for negligence of its control tower employees in regulating air traffic. The court noted as follows:

> "The government insists that its tower operators perform governmental functions of a regulatory nature; that no private individual has such power of regulation; that therefore the Act does not permit suit based on negligent performance of their duties. The situation involved here, says the Government, when viewed in all the circumstances, 'cannot be equated to one which would predicate analogous private liability,' and so it is said the claims are excluded from the coverage of the Tort Claims Act." 221 F.2d at 73.

The court went on to point out that it saw no reason why a private individual could not construct an airport and operate a control tower much as operated in the instant case, and that such an individual would, of course, be liable for the negligence of privately employed tower operators. Therefore, when the United States assumed a role parallel to that of private persons, it is liable for its negligent acts and omissions. The Court in *Eastern Air Lines* had little problem in finding that if the question was controlled by an operational-planning distinction, the duties performed were operational and stated:

> "It is therefore our opinion that, if a Government tower man negligently clears two planes to land on the same runway at the same time, or is guilty of some other negligent act or omission in doing his work, the Government is liable for resulting injury in the same manner and for the same reason that it is liable for injury done by the driver of a mail truck who, in exercising discretion as to how to drive, negligently runs through a red traffic light." 221 F.2d at 79.

The case of Downs v. United States, 522 F.2d 990 (6th Cir. 1975), is virtually impossible to reconcile with the case of Smith v. United States, *supra*. In *Downs* the claims resulted from the hijacking of a small passenger airplane. FBI agents refused to allow refueling when the plane landed and shot out one of the aircraft's engines. The hijacker thereupon shot and killed the two occupants of the plane and then himself. The court affirmed the trial court holding that the actions of the FBI agents did not fall within the purview of the discretionary act exemption. The court rejected the planning level versus operational level analysis and stated:

> "We believe that the basic question concerning the exception is whether the judgments of a Government employee are of 'the nature and quality' which Congress intended to put beyond judicial review. [Citations omitted.] Congress intended 'discretionary functions' to encompass those activities which entail the formulation of governmental policy, whatever the rank of those so engaged. We agree with a commentator's analysis of the provision:
>
> > It would seem that the justifications for the exception do not necessitate a broader application than to those decisions which are arrived at through an administrator's exercise of a quasi-legislative or quasi-judicial function. [Developments in the law-remedies against the United

States and its officials. 70 Harv. L. Rev. 827 (1957).]

The court further stated:

> "The proper approach is to consider the precise function at issue, and to determine whether an officer is likely to be unduly inhibited in the performance of that function by the threat of liability for tortious conduct. • • • The prospect of government liability for the actions of law enforcement officers should not cause those officers less vigorously to enforce the law. The need for compensation to citizens injured by the torts of government employees outweighs whatever slight effect vicarious government liability might have on law enforcement efforts." 522 F.2d at 998.

We suggest that the Court's characterization of the actions of the government employees in *Downs* as being tortious dictates the result which is to be achieved by balancing the interest of individuals which have sustained damages as against the possibility of inhibition of governmental activity. We suggest that such a balancing test sheds no light on whether or not a duty existed running from the government to the injured citizens, the violation of which resulted in the legal determination that a "tort" had been committed which could result in liability.

The case of Griffin v. United States, 500 F.2d 1059 (3d Cir. 1974), is a case frequently cited in this field. That action involved the claim of a woman who became a quadriplegic as a result of ingesting live virus polio vaccine. An action had been brought against the pharmaceutical manufacturer and settled prior to the Griffin claim against the government. It was alleged that the Division of Biologic Standards of HEW had subjected the polio vaccine to testing for safety in potency and approved it for release to the public in a manner inconsistent with and in violation of agency regulations. It was argued that the ingested vaccine was in a lot which was

tested and found to exceed the permissible levels of neurovirulence. That lot of vaccine was, nevertheless, released and approved because the agency reasoned that the unfavorable test results were not produced by defects in the vaccine sample tested, but rather the product of unusual characteristics of the particular monkeys innoculated with the vaccine. Such theory of "biological variation" resulted in discounting or disregarding as not significant what otherwise appeared to be excessive neurovirulence. The Court said:

> "The fact that judgments of government officials occur in areas requiring professional expert evaluation does not necessarily remove those judgments from examination of courts by classifying them as discretionary functions under the Act. • • • This court is fully capable of scrutinizing the processes and conclusions of the decisionmaker by the usual standards applied to cases of professional negligence." At 1066-67.

The majority opinion in *Griffin* concludes its discussion of the discretionary act exemption by stating:

> "Liability, in such cases, is predicated not on a negligent or unwise policy determination, but on the failure of Government employees to conform to and act consistently with the authority delegated. We do not hold that the Government may be liable for policy determinations made by its officials. Rather, we hold only that the Government may be liable where its employees, in carrying out their duties, fail to conform to pre-existing statutory and regulatory requirements." At 1069.

The dissenting opinion points out that the decision of the agency to release the vaccine may well have resulted from the exercise of a discretion permitted within the scope of the agency regulation and, therefore, was not in violation as contended by the majority.

Nevertheless, *Griffin* appears, implicitly at least, to be based on the planning level-operational level - standard since the majority virtually concedes that if the regulations governing the testing of the vaccine had been followed, such would constitute a planning level decision and fall within the discretionary function exemption. Of further interest in the *Griffin* decision is the court's holding that Mahler v. United States, 306 F.2d 713 (3d Cir. 1962), is distinguishable *since Mahler was based on negligence.*

Again, we note that *Griffin* appears unconcerned with the concept of tortious liability, but rather the imposition of liability when the government fails in some degree in its efforts to protect its citizenry and society in general by regulating and circumscribing the conduct of those who offer products or services to society.

In First National Bank in Albuquerque v. United States, 552 F.2d 370 (10th Cir. 1977), plaintiff relied on *Griffin*. The case involved the claim on behalf of four children who had eaten pork which had been fed grain treated with a mercury fungicide. The children permanently lost sight, speech, locomotion and use of hands. It was alleged that the government had inadequately tested and investigated the fungicide and failed to prohibit the use of the fungicide and failed to require labeling of the danger of food chain poisoning on the fungicide packaging.

The Court purports to agree with the *Griffin* case, however, it held that the discretionary function exception applied. The Court held that the labeling, warnings, precautions and directions for use required policy judgments in evaluating the adequacy of the labeling and thus involved only a generalized protection of the public safety. As to the government's authority to suspend or cancel the products registration, the Court said only:

> "Whether such discretion is exercised and possibly abused, or whether there is a failure to exercise the discretion, such acts or omissions related to the cancellation function are within the terms of the exception provided by § 2680(a)." At 377.

See also cases collected in Annot., 99 A.L.R.2d 1016 (1965).

Although the above review of decisions of the lower federal courts is not complete or exhaustive, we deem it sufficient to demonstrate a lack of coherent doctrine or rationale. We gain nothing by way of assistance to our analysis.

The decisions of the courts of our sister states likewise provide no guidance or assistance. Those decisions furnish nearly as many rationales and/or theories as there are jurisdictions.

In State v. Abbott, 498 P.2d 712 (Alas. 1972), the Alaska court held that a judgment against the state should be affirmed when the alleged negligence of the state was failure to adequately maintain a slippery highway during the winter time. That court concluded that such was within the ambit of an operational rather than a planning level decision and thus the state was not immune from liability under the discretionary act exception to the tort claims act. The same rationale was utilized in State v. I'Anson, 529 P.2d 188 (Alas. 1974), wherein it was alleged the state was negligent in failing to place warning signs and no passing zone striping on the highway, and the plaintiff sustained injury in a collision by reason thereof. In Adams v. State, 555 P.2d 235 (Alas. 1976), plaintiffs brought suit for death and injuries resulting from a fire in a hotel which had allegedly been negligently inspected and/or which the state and/or the municipality had negligently failed to close because of fire hazards. The Alaska court refused to apply the planning-operational dichotomy of *Dalehite*, but rather decided the case in favor of the plaintiff on "policy implications" and rejected the argument that such would be

a wrongful intrusion by the judiciary into other branches of government. (*See*, however, the dissent of Conner, J. *See also* Alas. Stat. § 09.65.070(d)(1)(A), wherein claims against municipalities could not thereafter be based on the failure to inspect, discover a violation or abate a violation.) *See also* State v. Morris, 555 P.2d 1216 (Alas. 1976), wherein plaintiff was denied recovery against the state on the basis of immunity when the decedent fell from a bridge which his employer was constructing for the State of Alaska and the state had negligently failed to require the contractor to use safety equipment; and Jennings v. State, 566 P.2d 1304 (Alas. 1977), where the state was held immune from liability for the death of a school girl attemping to cross a highway and it was alleged that the state had been negligent in failing to provide a safe crossing point.

In Nerbun v. State, 506 P.2d 873 (Wash.App. 1973), action was brought against the state for wrongful death resulting from the alleged negligence of the state in failing to enforce safety standards. There the court in denying liability said:

> "We do not believe the legislature intended to impose an absolute duty upon the Department of Labor and Industries to insure a safe place for workmen to be employed. The most the legislature intended was that the Department prescribe safety standards and secure some reasonable compliance through spot check inspections. In this way the safety conditions for workmen in general would be improved. The relatively small staff provided for the Department is indication of this legislative intent. The situation is akin to those cases where a city is not held liable because the police department and its officers failed to enforce an ordinance." At 877.

In Loger v. Washington Timber Products, Inc., 509 P.2d 1009 (Wash.App. 1973), the *Nerbun* decision was approved, the discretionary act exemption was discussed

and liability denied. *Loger* was also a claim against the state for alleged negligence in performing safety enforcement functions. Such impelled the court to discuss "where, in the area of governmental processes, orthodox tort liability stops and the act of governing begins . . ." At 1013.

In Campbell v. City of Bellevue, 530 P.2d 234 (Wash 1975), however, the liability of a municipality was upheld when an inspection disclosed a highly dangerous electrical condition on private property, but service to that property was not disconnected. Decedent was killed when she fell in a water body electrified by faulty wiring. Both *Nerbun* and *Loger* were distinguished on the basis that in *Campbell* an inspection had been carried out and the dangerous condition known by the municipality. It was further pointed out that if the state had been negligent in carrying out its duties, a state statute would have exempted it from liability. Nevertheless, the fact that a municipality attempted to exempt itself by ordinance was held not relevant.

In Walters v. Hampton, 543 P.2d 648 (Wash.App. 1975), the victim of a shooting brought an action against the city based on the negligence of the city in failing to protect him from a person with known proclivities for violence with firearms. The court held that the decision to prosecute was discretionary and thus fell within the exception to liability. The court said:

> "Furthermore, the amount of protection afforded by any individual police department is necessarily determined by the resources available to it. The determination of how these resources can most effectively be used is a legislative-executive decision. Were we to hold a police chief's failure to prosecute every alleged violation of a city ordinance exposes a municipality to civil liability in tort, we would be placing ourselves in a position of having to determine

how limited police resources are to be allocated. [Citations omitted.] This is neither a traditional nor appropriate role for the courts to assume." At 651.

The above case should be contrasted with Mason v. Bitton, 534 P.2d 1360 (Wash. 1975). There a speeding automobile was being pursued by police when the driver, at a speed of 140 miles per hour, lost control and collided with another vehicle killing himself and the occupants of the other vehicle. That court held that the decision to pursue was an operational decision, not falling within the discretionary function exemption to tort liability. Hence, liability could be placed on the state.

In our view, the acts would clearly fall within the police power and the court's holding a judicial invasion of the operations of another branch of government. Mason seems impossible to reconcile with that court's prior cases. It should be noted that the collision occurred between the pursued vehicle and an oncoming car. If the colliding vehicle had been that of the police, a different rule might be applicable. *See also* Halvorson v. Dahl, 574 P.2d 1190 (Wash. 1978), wherein the Washington court held that the plaintiff widow of decedent stated a claim against the city whose all ged [sic] negligence in enforcing the building and safety codes caused the death of a decedent in a hotel fire. *But see*, Georges v. Tudor, 556 P.2d 564 (Wash.App. 1976).

In Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967), plaintiff decedent was crushed by the partial collapse of a retail store and the city was named a defendant on the basis of alleged negligent performance of inspection of construction in progress and failing to discover the defect which caused the collapse. The court suggested that legislative and judicial discretion will not sustain municipal liability in tort, but such liability will be sustained in the case of executive or administrative

activity. The court found that the activity complained of fell within executive or administrative activity, but nevertheless plaintiff could not recover since the city building inspector at the time he allegedly negligently performed the inspection "owed no duty to Mrs. Modlin in any way different from that owed to any other member of the public. Therefore, the city is not liable under the rule of respondeat superior." At 76. The court said also, "We do not attempt to grapple with the question, much-litigated in other jurisdictions, but apparently not in Florida, whether the public officers are not immune from tort liability for injury resulting from their discretionary acts." *Id.*

See also the following cases of the Florida Court of Appeals: Dep't of Health & Rehabilitative Services v. McDougall, 359 So.2d 528 (Fla.App. 1978); Cheney v. Dade County, 353 So.2d 623 (Fla. App. 1977); Sapp v. City of Tallahassee, 348 So.2d 363 (Fla.App. 1977); Gordon v. City of West Palm Beach, 321 So.2d 78 (Fla.App. 1975); Florida First National Bank of Jacksonville v. City of Jacksonville, 310 So.2d 19 (Fla.App. 1975), *cert. denied* 339 So.2d 632 (Fla. 1976). All of such cases appear to have held that recovery was not allowed on the basis that the duty, if any owed by the governmental entity, was not to any individual person, but rather to the public in general.

In Coffey v. City of Milwaukee, 247 N.W.2d 132 (Wis. 1976), plaintiff brought action against the city and its building inspector to recover for fire damage allegedly caused by the building inspector's negligence in inspecting the premises for fire danger. The Wisconsin court repudiated the distinction between governmental and proprietary act and refused to follow the rationale of cases discussed in Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967); Hoffert v. Owatonna Inn Towne Motel, Inc., 199 N.W.2d 158 (Minn. 1972); and Duran v. City of Tucson, 509 P.2d 1059 (Ariz. 1973). The court

in *Coffey* held that the imposition of liability did not always flow from a finding of negligence and cause in fact but rather that the decision should rest on considerations of public policy. The court stated:

> "Thus, this court has held that even where the chain of causation is complete and direct, recovery may sometimes be denied on grounds of public policy because: (1) the injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tortfeasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) *allowance of recovery would enter a field that has no sensible or just stopping point.*" At 140. (Citations omitted; emphasis supplied.)

The court concluded:

> "[T]he dispute here involves public policy considerations and requires the balancing of various policy factors in determining whether there is to be liability at all, and if so, the extent thereof. The instant case involves a complex issue of municipal tort liability arising out of the alleged negligence of a building inspector in carrying out fire inspections. The factual connections are so attenuated that a full trial should precede this court's determination of the policy considerations." At 140-41.

See Lifer v. Raymond, 259 N.W.2d 537 (Wis. 1977), wherein a guest passenger who had been injured in a one-car automobile accident brought an action against the road test examiner employed by the State Department of Transportation alleging that the examiner was negligent in granting the driver of the car a probationary driver's license because the driver was so grossly obese as to prevent her from exercising reasonable control over a motor vehicle. Therein liability was denied with the court holding that the determination of the examiner as to the ability of an applicant involved an exercise of judgment and discretion.

In Hoffert v. Owatonna Inn Towne Motel, Inc., 199 N.W.2d 158 (Minn. 1972), a fire had occurred in a motel injuring the four plaintiffs and it was alleged that the granting of the building permit for changes was in violation of the building code and hence the municipality was liable for negligence. The court held that since a building inspector acted exclusively for the benefit of the public, as distinguished from an individual, any individual who was injured by an alleged negligent performance of the building inspector does not have a cause of action.

See, however, Hansen v. City of St. Paul, 214 N.W.2d 346 (Minn. 1974). There the issues before the court were whether the municipality has committed a tort in permitting dogs known to be dangerous, vicious and impoundable to prowl uncontrolled upon the public sidewalks in a residential area. The court said, "[i]n so holding we are mindful that it may be claimed or believed this decision opens a Pandora's box with respect to municipal liability for other moving hazards upon the public streets and sidewalks, such as attacks upon pedestrians by public drunks or by persons committing violent or criminal acts." At 350. The court held that since the city had knowledge of the vicious dogs prowling the public sidewalks, such did not constitute a discretionary function and the municipality was therefore not immune from liability. *See also*, Lorshbough v. Township of Buzzle, 258 N.W.2d 96 (Minn. 1977). Therein a township which maintained a dump was held to have owed a duty of care to neighboring property owners who were dam-

aged as a result of fire which started in the township dump.

In Motyka v. City of Amsterdam, 204 N.E.2d 635 (N.Y. Ct.App. 1965), the court dealt with a claim against a municipality as a result of a fire. The court held that liability would exist only, and such was not found, if a duty was found to use due care for the benefit of particular persons as distinguished from the duty to the general public to supply adequate police or fire protection.

See also, however, Smullen v. City of New York, 320 N.Y.S.2d 19 (Ct.App. 1971), wherein liability was found when an inspector noted a violation of building codes when a trench had been over-excavated without bracing or shoring and the inspector had led decedent into a position of peril. The court held that the presence and approval of the inspector created a special relationship and, therefore, a duty to the particular individual decedent. *Motyka* was therefore distinguished. *See also* Florence v. Goldberg, 369 N.Y.S.2d 794 (S.Ct.App.Div. 1975), wherein it was held that a regulation relating to a school crossing guard resulted in a special duty to school children and that the municipality was therefore not exempt from liability. This case was affirmed by the New York Court of Appeals, 375 N.E.2d 763 (1978).

See, however, Klee v. State, 404 N.Y.S.2d 772 (Ct. Claims, 1976).

See also Bruno v. Codd, 396 N.Y.S.2d 974 (S.Ct. 1977), regarding an action brought against police officers, the probation department and family court on the ground that they had failed to protect and assist wives assaulted by husbands.

See also Stranger v. New York State Electric & Gas Corp., 268 N.Y.Supp.2d 214 (S.Ct., App.Div. 1966).

In Jahnke v. Incorporated City of Des Moines, 191 N.W.2d 780 (Iowa 1971), a plaintiff had sued the municipality for damages when he was injured by stones thrown by a mob standing on a street corner. The court held that there was no duty owning an individual citizen from a municipality or its police force since there was no duty running to the plaintiff individually as distinguished from a member of the general public. *See also* Hannon v. Counihan, 369 N.E.2d 917 (Ill.App. 1977); and Dufrene v. Guarino, 343 So.2d 1097 (La.App. 1977).

In Duran v. City of Tucson, 509 P.2d 1059 (Ariz.App. 1973), the Arizona Court of Appeals held that when a plaintiff was injured as a result of fire which in turn allegedly resulted from the municipality's failure to annually inspect the premises of plaintiff's employer, no recovery could be had since, although the doctrine of governmental immunity has been abrogated, the only duty owed was to the public in general as contrasted with a duty to an individual.

In Grimm v. Arizona Bd. of Pardons and Parole, 564 P.2d 1227 (Ariz. 1977), the Arizona court held that the negligent release of a highly dangerous prisoner on parole by the parole board narrowed the otherwise public duty of the board to the decedent who was shot during a robbery by the parolee. The liability of the board of pardons was upheld by the court, stating, "Negligent performance of a duty voluntarily undertaken may be a basis for liability." At 1234. The court also stated, "While leaving intact the absolute judicial immunity enjoyed by participants in judicial proceedings, we now abolish the absolute immunity previously granted to public officials in their *discretionary functions*." At 1283. (Emphasis supplied.) The first paragraph of the dissent of Hays, J., is worthy of quotation:

> "Beware, oh unsuspecting trial judge, that when your decision to place a felon on probation goes hor-

ribly awry, the majority of my brothers sitting in cloistered ivory tower call your action gross and subject you to the consequences thereof. I hasten to concede that the majority opinion does not say this but logic tells me that the discretionary acts of the parole board need no less protection than those of the sentencing judge. There may be boards or commissions, bastions of bureaucracy, which should not be accorded the protection of quasi-judicial immunity, but the parole board is hardly one of these." At 1237.

See, however, the later Arizona cases of Wesley v. State, 571 P.2d 1057 (Ariz.App. 1977), wherein it was held that the Department of Liquor Licenses had no duty to protect a patron of a bar, although the board had information of prior violence, and failed to revoke or suspend the license, and McGeorge v. City of Phoenix, 572 P.2d 100 (Ariz.App. 1977), where liability was denied against a municipality who failed to protect a vehicle owner against the known violent propensities of a neighboring property owner.

In 1961, the Supreme Court of California in Muskopf v. Corning Hospital Dist., 359 P.2d 457, abrogated the previous existing doctrine of governmental immunity for tort in California. The Court stated, "[t]he rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia." At 460. That decision was heavily relied upon in this Court's decision in Smith v. State, 93 Idaho 795, 473 P.2d 937 (1970). The Court in *Muskopf*, speaking through Mr. Justice Traynor, went on to indicate, however, that abrogation of governmental immunity does not mean that the state is liable for all harms that result from its activities. "Both the state and individuals are free to engage in many activities that result in harm to others so long as such activities *are not tortious*." At 462. (Emphasis supplied.) The Court there attempted to distinguish between officials' negligent performance of ministerial duties (for which they could be held liable) and discretionary acts within the scope of their authority (for which they would not be held liable). The Court held that insofar as discretionary acts are concerned, the justification for not abolishing such immunity was the danger of diminishing the desire of public officials to carry out their duties. Quoting Learned Hand, J., in Gregolre v. Biddle, 177 F.2d 579 (2nd Cir. 1949).

Issued the same day as *Muskopf* was the case of Lipman v. Brisbane Elementary School Dist., 359 P.2d 465 (Cal. 1961). Therein it was alleged that the school trustees sought to discredit the school superintendent and force her from her position. The court held that the trustees were acting within the scope of their discretionary, as contrasted with ministerial, powers and were, therefore, within the continued immunity rule.

In 1963 the California legislature enacted a tort claims act and exempted from that legislative abolition of sovereign immunity "discretionary" actions. In 1968, in Johnson v. State, 447 P.2d 352 (Cal. 1968), the court had for consideration the claim that the California Youth Authority had acted negligently in allowing a 16 year old boy with homicidal tendencies and a background of violence and cruelty to be placed in the home of plaintiffs, who would act as foster parents. Plaintiffs thereafter suffered personal injuries by reason thereof. It was alleged that the State had a duty to warn of a foreseeable peril and had failed to do so.

The Court in *Johnson* attempted again to distinguish between an immune "discretionary" decision and an unprotected ministerial act. It used language such as:

> "[a]dmittedly, our interpretation will necessite delicate decisions; the very process of ascertaining whether an official determination rises to the level of insulation from judicial review requires sensitivity to the considerations that enter into it and an appreciа-

tion of the limitations on the court's ability to re-examine. Despite these potential drawbacks, however, our approach possesses the dispositive virtue of concentrating on the reasons for granting immunity to the governmental entity. It requires us to find and isolate those areas of quasi-legislative policy-making which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision." At 360-61.

Aside from the language above quoted, the California court failed to resolve the problem and "avoid this potential quagmire."

In McCorkle v. City of Los Angeles, 449 P.2d 453 (Cal. 1969), plaintiff was injured when, following an automobile accident, he and a city policeman were standing in an intersection where a previous accident had occurred and plaintiff was struck by an oncoming automobile. It was contended that the policeman's act in investigating the accident was "discretionary" and thus immune. The court found that while the police officer may have been exercising discretion in undertaking his investigation, the injury to plaintiff was not the result of that exercise of discretion, but rather resulted from the negligence of the officer which followed his exercise of discretion. Hence, the court found no immunity.

In Ramos v. County of Madera, 484 P.2d 93 (Cal. 1971), it was alleged that two families who were the recipients of public assistance were required to work as a condition to receiving further assistance. An action was brought seeking injunctive and declaratory relief on the basis that minors had been "wrongfully coerced to work."

The court said:

> "The tortious acts complained of consist of coercing plaintiffs to work as a condition to receiving AFDC payments [contrary to various statutes] . . ." At 97.

The court stated:

> "[i]n *Johnson* we reviewed the semantic quicksand which had ensnared the concept of 'discretion' in an unyielding trap of incomprehensibility. We noted that discretionary acts have been defined as 'those wherein there is no hard and fast rule as to the course of conduct that one must or must not take.' [Citation omitted]) Finding the semantic distinctions between 'discretionary' and 'ministerial' inadequate as a method of deciding actual controversies, we followed our landmark precedent of Lipman v. Brisbane Elementary School Dist., *supra*, in concentrating on policy considerations relevant to the government claim of immunity. Discretionary activity, we held, is that related to basic policy decisions, or that activity sometimes characterized as the 'planning' as opposed to the 'operational' level of decision making." At 98-99.

The court continued,

> "We are satisfied that a public entity may be liable in tort pursuant to Government Code, section 815.6, where it knows or should know that its failure to exercise its duty to reasonably supervise employees will result in coercing others to violate state laws, and where such violation proximately results in an injury of the kind which the law was designed to prevent. Public entities have, inter alia, a mandatory duty to obey legislative enactments, of which the entities must conclusively be presumed to have knowledge. Public entities certainly have a mandatory duty not to coerce others—either by force or by a threatened withdrawal of life-sustaining aid—to *violate* state laws, whether or not the entity is specifically charged with enforcing that particular law. Nor does any employee have 'discretion' to coerce California citizens to break the law." At 100-01.

Hence, the court found that a cause of action had been stated and that the acts did not fall within the immune area.

In Baldwin v. State, 491 P.2d 1121 (Cal. 1972), plaintiff's vehicle was struck from the rear and knocked into another lane of traffic where it was struck head-on. The California statutes provided that there shall be no governmental liability for an injury caused by the plan or design of a construction of or improvement to public property where such plan or design has been approved in advance of the construction or improvement by the legislative body. Such is similar to the Idaho statute. The court stated the question to be whether design immunity once having attached is perpetually effective regardless of any subsequent change of conditions. The court stated:

> "Having approved the plan or design, the governmental entity may not, ostrichlike, hide its head in the blueprints, blithely ignoring the actual operation of the plan. Once the entity has notice that the plan or design, under changed physical conditions, has produced a dangerous condition of public property, it must act reasonably to correct or alleviate the hazard." At 1127.

Summary judgment in favor of the State was reversed.

In County of Sacramento v. Superior Court of Sacramento County, 503 P.2d 1382 (Cal. 1972), the real parties in interest sought damages for wrongful death resulting from a prisoner escaping from a jail maintained by the defendant. Liability was denied on the basis of statutory immunity from liability dealing with escaped prisoners. Plaintiffs contended that the act of leaving the jail door unlocked was not a discretionary act, but was ministerial in nature, but such argument was rejected by the court.

In H F H Ltd. v. Superior Court of Los Angeles County, 542 P.2d 237 (Cal. 1975), plaintiffs sought al-

ternative remedies in the nature of inverse condemnation or for damages in tort by reason of the municipality's adoption of zoning plan which allegedly damaged plaintiff's property. The court, in holding no liability in the tort aspect of the action, cited the dissent of Jackson, J. in Dalehite v. United States, *supra*, stating, "Justice Jackson's mot expresses both a principal of law and a necessity of rational government; both constitutional and institutional understandings require that legislative acts, even if improper, find their judicial remedy in the undoing of the wrongful legislation, not in money damages awarded against the state." At 245.

In Tarasoff v. Regents of the University of California, 551 P.2d 334 (Cal. 1976), the California court took another major step. There a patient had confided to his therapist his intention to kill plaintiff's daughter. Although there was no relationship between the victim and the doctor, the court nevertheless held that a cause of action had been stated. The court, in so holding, stated:

> "In analyzing this issue, we bear in mind that legal duties are not discoverable facts of nature, but merely conclusory expressions that, in the case of a particular type, liability should be imposed for damage done. . . . The assertion that liability must . . . be denied because defendant bears no 'duty' to plaintiff 'begs the essential question—whether the plaintiff's interests are entitled to legal protection against defendant's conduct. . . . [Duty] is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." At 342. (Citations omitted.)

Hence, the court held that plaintiff had stated a case for the therapist's negligent failure to warn the victim. The court held that although no special relationship existed between the victim and the therapist, there did exist be-

tween the killer and his therapist a relationship of patient and doctor. The court said, "[s]uch a relationship may support affirmative duties for the benefit of third persons." At 343. (The dissent points out the resulting problem of the breach of the physician-patient relationship, the inherent difficulty in a therapist forecasting the danger of violence, the necessity of confinement to prevent the danger and the risks to society in general of a rule which enlarges the numbers of the mentally ill required to be confined.) On the issue of the discretionary act exemption, the court simply held that since the rule laid down was applicable to private therapists, the same must necessarily apply to and liability result toward every governmentally employed therapist.

In Sandborn v. Chronicle Publishing Co., 556 P.2d 764 (Cal. 1976), plaintiff brought an action for defamation against the City and County of San Francisco and its clerk. The clerk had been holding monies of the plaintiff which he released to plaintiff and explained the transaction to a newspaper reporter in terms unflattering to plaintiff. The court held that the activities of the clerk did not fall within the immunized discretionary act area stating, "A governmental officer's discussion with the public or press regarding the functioning of his office would seem, instead, to fall within the category of those routine, ministerial duties incident to the normal operations of that office." At 769.

In Morris v. County of Marin, 559 P.2d 606 (Cal. 1977), plaintiff, who was injured in the course of his employment and was unable to secure any workmen's compensation benefits because his employer was uninsured, brought suit against the county for its failure to require the employer, in obtaining a building permit, to file a certificate of workmen's compensation insurance. Although the statute provides that a public entity is not liable for injury caused by the issuance, denial, suspension or failure or refusal to issue or deny, suspend or

revoke a permit, such did not deter the court from finding liability. The court said:

> "A public entity, of course, does not have authority to determine 'whether or not' to issue a permit when it only performs a ministerial, non-discretionary duty. In such cases the 'basic policy decision' has already been made at a different governmental level. . . . Thus, the statutory language itself suggests that the section's immunity attaches only to discretionary activities." At 613. (Citations omitted.)

The court stated, "[t]o reiterate, in the instant case, plaintiff seeks to impose liability on the county not for failure to discharge a discretionary governmental function, but rather for failure to perform a mandatory duty which the county could not in its discretion ignore." At 616.

We now return to a consideration of Idaho's court made and statutory law.

This Court in Smith v. State, 93 Idaho 795, 473 P.2d 937 (1970), first held that the doctrine of sovereign immunity was not a valid defense in actions based on tortious acts of the state. We deem it clear that *Smith* did not create a new cause of action, but was rather the abolition of a total defense to an action in the traditional and orthodox field of tort liability. The Court stated:

> "Each of the three cases now before this Court presents an identical question; viz., whether or not the doctrine of sovereign immunity with regard to the tort liability of the State of Idaho is to be abolished.
>
> 'An immunity * * * avoids liability in tort under all circumstances * * * it is conferred, not because of the particular facts, but because of the *status or position of the favored defendant; and it does not deny the tort, but the resulting*

liability,' W. L. Prosser, Law of Torts, 996 (3d ed. 1964)." At 799.

The Court pointed out that it was irrational to deny recovery to a plaintiff who suffered personal injury because of negligent acts of the state when recovery would have been allowed if the defendant had been a private individual.

The Court set forth the standard of care required of the state in the maintenance of state highways, "it is our opinion that the standard should be similar to that owed by a private individual who is the owner or possessor of land to an invitee." At 804. The Court then proceeded to lay out the specific standard of care placed upon the state, which is substantially the same as any other owner or possessor of land owes to an invitee.

Thereafter, our legislature in 1971 (1971 Idaho Sess. Laws Ch. 150) enacted the Idaho Tort Claims Act. The opening language of that legislation provided:

> "Waiving the defense of sovereign immunity of the state and its political subdivisions; providing that this act shall be known and cited as the 'Idaho Tort Claims Act'; providing definitions; providing liability of the state and its political subdivisions for their tortious conduct and providing for exceptions; providing exceptions to tort liability. . . ."

Section II(7) of that act (now codified as I.C. § 6-903(a)) provides that a governmental entity shall be liable for acts "where the governmental entity if a private person or entity would be liable for money damages under the laws of the state of Idaho."

As we have indicated above, there is no uniformity of interpretation of such language by courts nor are there alternative interpretations from which we might select as persuasive that one interpretation most supported by logic and reason. Rather, we find a melange of decisions

wherein reason at times seems to have flown out the window. At one extreme, we find decisions which appear to make a mockery out of the oft repeated maxim of Jackson, J. dissenting in *Dalehite*, that "it is not a tort for a government to govern." Decisions which under the guise of *tort* liability theory award damages for: a killing by a murderer while law enforcement officers were engaged in attempted crime prevention (Downs v. United States, *supra*); for death or injury perpetrated by a convicted felon whom penal officials believed was sufficiently rehabilitated to enter society (Grimm v. Arizona Board of Pardons, *supra*); welfare recipients being required to work (Ramos v. County of Madera, *supra*). At the other extreme, we have the decision of the highest court in the land in *Dalehite* denying recovery in a situation in which a private person would assuredly be held to liability, but the government is deemed immune solely because of the governmental official level at which a decision was made to endanger others.

Hence, although we may derive some scintilla of intent from the legislative language, we are left with the task of determining and enunciating policy. We hold that our legislature has intended that wherein tort liability would attach to a private person, a governmental entity engaging in the same conduct will be liable. We do not ascertain an intent to create a new cause of action against a governmental entity for its attempts to govern.

We postulate that if government is not able to govern, anarchy and chaos are the only alternatives. If government is to govern, persons must be selected to operate and implement the abstract notions of what government should do. If government is to perform the function of controlling the interrelationships between individual members of our society (admittedly an oversimplification), it must be able to provide standards of conduct whether they be called statutes, regulations, ordinances, ukases or decrees. With exceptions not applicable here, such func-

tions of government have traditionally been seen as sacrosanct from invasion by the judicial branch.

Here we are faced with claims against the government relating to the governmental function of governing. There are not parallel functions in the private sector. We are essentially concerned with the abilities of officials, the enactment of regulations, and the enforcement of standards. A finding of liability for breach of those "duties" running to plaintiffs would result in the creation of a new cause of action which we deem not to be contemplated by our legislature, and foreign to traditional concepts of the law of torts.

We do not so find on the basis that the duty alleged runs only from the government to society at large, rather than to these particular and individual plaintiffs. We do not so find on the basis that the performance of governmental employees would be inhibited. We do not so find on the basis that there should be a distinction between decisions made by a cabinet officers, viz-a-viz, a governmental employee truck driver. Our decision today is bottomed on the allegation of plaintiffs' complaints. As a case of first impresion in Idaho, we need go no further. Other cases on other days which present other problems of analysis are best left to be decided on a case by case basis. To the end that this not be misconstrued, we do not contemplate that liability under the Idaho Tort Claims Act wil result only from damages resulting from automobile accidents. Hopefully, our marginal comments relating to other decisions from other jurisdictions will suffice in this regard.

The cause as it relates to the Union is reversed and remanded for further proceedings. The cause as it relates to the State is affirmed.

DONALDSON, C.J., and McFADDEN, J., concur.

BAKES, J., specially concurring in Part I:

In light of the decisions of the Supreme Court of the United States in Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters, —— U.S. ——, 98 S.Ct. 1745 (1978), and Farmer v. Carpenters, Local 25, 430 U.S. 290, 97 S.Ct. 1056 (1977), I concur with the majority's ruling that the trial court erred in dismissing the appellants' wrongful death action against respondent United Steelworkers because of the preemption doctrine. An action for wrongful death is a creature of our state statutes, is of substantial local interest, and traditionally has been committed to the jurisdiction of the courts of the state. Moreover, this action for wrongful death is unlikely to present the identical legal issues as a proceeding under the federal labor laws arising from this same factual setting. Assertion of jurisdiction by the courts of this state over the appellants' action would appear to present no significant risk of undue interference with national labor policy.

Nevertheless, in both *Farmer* and *Sears, Roebuck*, the court ruled that the jurisdiction of the state courts and state tort law was not preempted, only after a careful scrutiny of the legal issues raised by the actions under state law—intentional infliction of emotional distress in *Farmer* and trespass in *Sears, Roebuck*. In the instant case the precise nature of the legal issues raised by the appellants' wrongful death action is not entirely clear at the present procedural posture of the case. Indeed, it has not yet been determined by either the trial court or this Court that the appellants' complaint in fact states a claim for relief in tort against the respondent union. *Cf.* Just's Inc. v. Arrington Constr. Co., 99 Idaho 462, 583 P.2d 997 (1978) (ordinarily mere breach of contract not a tort); *see also* McAlvain v. General Ins. Co. of America, 97 Idaho 777, 554 P.2d 955 (1976); Taylor v. Herbold, 94 Idaho 133, 483 P.2d 664 (1971). That

issue was not briefed in this appeal and so we do not reach it.

In my view a final decision whether the wrongful death action against the respondent union is preempted by federal labor laws must therefore await a full factual development of the legal issues raised under our state tort law.

DONALDSON, C.J., and McFADDEN, J., concur.

BISTLINE, J., concurring and dissenting.

I join the Court's opinion wherein it is held that summary judgment of dismissal in favor of the United Steelworkers should not have been granted. I am unable to agree that the State of Idaho was entitled to a dismissal at the summary judgment stage of the action against it, and briefly state the reasons which in my view require that that cause, too, should be heard and determined on the merits.

In my view the deceased miners who entered the portals of Sunshine's mine not only had a right to rely upon the allegedly assumed duty of the union to inspect the conditions and practices prevalent in that mine, but equally had a right to rely upon the State's statutory obligation. The obvious question here is: Who, if not the State and if not the Union, had the obligation to assure the miners that they were not being subjected to dangerous working conditions and practices? An easy answer, of course, is that the miners could see for themselves the conditions and practices, and could, so to speak, stay out of the kitchen if they didn't like the heat. However, I think that most will agree that such philosophy no longer obtains in this country. These miners, with dependents to support, were not exactly free spirits who could simply leave a job, the conditions of which may have appeared unsafe. Whether or not they were aware

of any dangerous existing conditions and practices, by reason of their daily exposure thereto, it is the widows and children of those deceased miners who are the plaintiffs in these statutory wrongful death actions, and their right to rely upon the defendants' fulfillment of their alleged obligations to look out for the safety of their fathers and husbands is no less than the right in the miners themselves.

It is claimed by the widows and children that the State of Idaho was negligent in regard to its obligation to inspect the mines and secure to the miners safe working conditions. The State of Idaho responds that the pertinent Idaho statutes and regulations imposed upon the Inspector of Mines and his deputies duties which were wholly "discretionary" in nature, and hence liability for negligence may be avoided by application of that section of the Idaho Tort Claims Act which exempts the State from its negligence with respect to a discretionary function or duty on the part of the State or its employee.

The briefs are replete with lengthy citation of authority intended to light the way in concluding that the State's activity in mine safety was or was not a discretionary function, but the divergence of view is great, as might be expected. None of this case authority bears any close resemblance to the relationship we consider today—the assumed obligation of the State of Idaho for the safety of the man who works in the dark and unknown world below the surface of the earth.

The State in its brief, while decrying as mechanical an approach (by the widows and children), which would categorize and distinguish between that which is "operational" and that which is "planning level" in its turn would have us equate the mine inspector's duties with those of a building inspector. The State relies heavily on the Minnesota case of Hoffert v. Owatonna Inn Towne

Motel, Inc., 199 N.W.2d 158 (Minn. 1972), urging upon us that that court held "that in order to recover plaintiffs had to show a breach of some duty owed to them in their individual capacities, and not merely a breach of some obligation *owed to the general public.*" For the same proposition the State cites and discusses Amato v. City of New York, 268 F.Supp. 705 (S.D.N.Y. 1967), Ivicevic v. City of Glendale, 549 P.2d 240 (Ariz. App. 1976), Delarosa v. State, 518 P.2d 582 (Ariz. App. 1974), Duran v. City of Tucson, 509 P.2d 1059 (Ariz. App. 1973), Hensley v. Seminole County, 268 So.2d 452 (Fla. Dist.Ct. App. 1972), Fiduccia v. Summit Hill Construction Co., 262 A.2d 920 (N.J. Dist.Ct. 1970), Evers v. Westerberg, 329 N.Y.S.2d 615 (App. Div. 1972), Whitney v. City of New York, 275 N.Y.S.2d 783 (App. Div. 1966), Stranger v. New York State Electric & Gas Corp., 268 N.Y.S.2d 214 (App. Div. 1966), Stubley v. Allison Realty Co., 108 N.Y.S. 759 (App. Div. 1908), Reid v. City of Niagara Falls, 216 N.Y.S.2d 850 (Sup.Ct. 1961), and Lockwood v. Village of Buchanan, 182 N.Y.S.2d 754 (County Ct. 1959). Following its discussion of these cases the State declares that:

> "It is through the instrument of regulations and safety standards, inspections and compliance orders, that the State seeks to regulate safety and health conditions in mines, with the view of accommodating both the interests of the mine operators and workers. However, responsibility for the operations and control over mine facilities remains a private venture and not the direct responsibility of the State."

It seems quite clear to me that the concern of the State of Idaho with regard to the mines of this State has nothing whatever to do with the general public. It is equally clear that the responsibility of the mine owners to furnish a safe place in which to work, abrogated by the Workmen's Compensation Law insofar as civil liability is concerned, does not in any way lessen the duty

of mine inspection which the State has assumed to carry out by reason of well-intended legislative enactment. A mine is not a public building. It is not a public place. There is nothing in this record which intimates that the families of these disaster victims ever had any access into that mine, or any right of access. In fact, other than that the legislature created in the mine inspector the power and authority to enter the mines of this state, it is doubted that he would have any greater access to those mines than that available to the public in general, which so far as appears is by invitation only.

It is also important to note that the provisions of I.C. § 47-104 (current version at I.C. § 44-109) are aimed, not at all at protecting the public against dangerous or insecure conditions, but "for the purpose of making said mine safe for the employees therein . . ."

Notwithstanding the foregoing, the State tells us in its brief that the duty imposed on the mine inspector "existed for the benefit of the public in general" and at another place that the mine inspector's decisions are "of public safety" and his decision "involves a balancing of competing policy considerations, accommodating both the interests of the mine operators and workers."

Nothing which I read in the statutory enactments suggests in the least that the mine inspector was to make a policy judgment and perform a balancing act which will afford some measure of protection to the miners so long as it also accommodated the interests of capital. Quite the contrary, the policy determination had been made by the legislature. That determination was that miners were to be afforded the protection of government control examination and inspections so as to insure those miners safe working conditions and practices. That determination was that the State do this by a qualified person upon whom was conferred certain specified powers and authority—with concommitant obligations to those

miners who were perceived by the legislature to be in need thereof.

The only issue before us is whether the action should have been terminated on motions for summary judgment. My vote is that it should not have been. That is not to say that each defendant might not be entitled to a judgment of involuntary dismissal when the evidence has all been presented, but until that has been done, neither this Court nor the trial court are in any position to rule as a matter of law that the widows and children of the deceased miners are without any claim for relief for the losses suffered allegedly by reason of the negligence of the defendants. Brown v. United States, 374 F.Supp. 723 (E.D. Ark. 1974), State of California v. United States, 151 F.Supp. 570 (N.D. Cal. 1957), Bulloch v. United States, 133 F.Supp. 885 (C.D. Utah 1955), Guy F. Atkinson Co. v. Merritt, Chapman, & Scott Corp., 126 F.Supp. 406 (N.D. Cal. 1954). What Justice Bakes has written in his concluding paragraph is appropriate to the motion of the State of Idaho as well as to the motion of the United Steelworkers.

APPENDIX F

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF SHOSHONE

Case No. 17694

THARON RAWSON, Individually and as Guardian ad Litem for her minor Children, SETH RAWSON and CINDY RAWSON, heirs of JOHN R. RAWSON, deceased,
Plaintiffs,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association;
and STATE OF IDAHO,
Defendants.

Case No. 17741

BERNIECE JOHNSON, Individually, and as Guardian ad Litem for MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON and JOHN RUSSELL JOHNSON, minor children; and CHRISTINE JOHNSON and DONALD JOHNSON, heirs of WAYNE LYLE JOHNSON, deceased,
Plaintiffs,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association;
and STATE OF IDAHO,
Defendants.

Case No. 17742

LAURA DUNBAR, as Guardian ad Litem for RICKINA ROSSITER and GLEN RAYMOND ROSSITER, JR., her minor children, heirs of GLEN RAYMOND ROSSITER, deceased,
Plaintiffs,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association;
and STATE OF IDAHO,
Defendants.

Case No. 18222

MARY WOOD, as Guardian ad Litem for LESLIE D. WOOD, her minor child, heir of DON B. WOOD, deceased,
Plaintiffs,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association;
and STATE OF IDAHO,
Defendants.

MEMORANDUM DECISION AND ORDER

Defendant Union has moved to dismiss, or, in the alternative, for summary judgment, and the essential facts upon which the motion is based are not in dispute. The defendant Union was the duly designated collective bargaining agent for the hourly employees of the Sunshine mine and had entered into a union contract with Sunshine Mining Company, which contract, among other things, established a safety policy to be policed by a safety committee of the Union and provided for grievance procedures.

On May 2, 1972 a fire occurred underground in the Sunshine mine, resulting in the deaths of many of its employees, both salaried and hourly.

Plaintiffs' Complaints were brought under the Idaho Wrongful Death Statute and the Complaint alleges that the Union owed the plaintiffs decedent a duty of due care under Idaho law and that such duty was violated by performing its specified services negligently, having undertaken to act as accident prevention representative and enforcer of the company-Union agreement.

The Complaint further alleges that these negligent acts were jointly and severally a proximate cause of the deaths of the miners.

Defendant Union argues that the cause of action here concerned has been preempted by federal labor law and, hence, the State court has no jurisdiction to proceed to consider the question of negligent representation under basic tort principles.

It is apparent that the Union, under federal law, owes the duty of fair representation to its membership and that such duty includes the statutory obligation to serve the interest of all members without hostility or discrimination towards any, and to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. It is further apparent that if this duty is violated that the Union would be subject to an unfair labor practice charge with the National Labor Relations Board or by commencement of a suit in a federal or state court. However, in whatever forum this question is presented, that is, a claim of inadequate representation, the federal law would govern the disposition of the claim on its merits.

Negligent performance of its contractual duties does not state a claim under federal law for breach of fair representation. Plaintiffs' Complaint is grounded solely

on recognized principles of tort law and the federal labor act does not recognize that responsibility of the Union in its representative capacity.

It would serve no useful purpose here to discuss the whys and wherefores of the national labor policy, but suffice it to say that federal labor law has preempted the field of union representation and its obligation to its membership and has elected to define the duties imposed on the Union, which does not include the field of negligence.

Under these circumstances, it would appear that defendant Union's Motion for Summary Judgment would be and the same is hereby granted and defendant Union be and it is hereby dismissed as a defendant in the above entitled actions.

BE IT SO ORDERED.

Dated at Wallace, Idaho this 29th day of January, 1976.

/s/ James G. Towles
JAMES G. TOWLES
District Judge

APPENDIX G

IN THE SUPREME COURT
OF THE STATE OF IDAHO

No. 15338

Reh. No. 89RH-8

THARON RAWSON, individually, and as Guardian Ad Litem for her minor children, SETH RAWSON and CINDY RAWSON, heirs of JOHN R. RAWSON, deceased,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

BERNIECE JOHNSON, individually and as Guardian Ad Litem for MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON and JOHN RUSSEL JOHNSON,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

LAURA DUNBAR, as Guardian Ad Litem for RICKINA ROSSITER and GLEN RAYMOND ROSSITER, JR., minor children and heirs of GLEN RAYMOND ROSSITER,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

MARY WOOD, as Guardian Ad Litem for Leslie D. Wood, her minor child, heir of DON B. WOOD, deceased,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA, an unincorporated association,
Defendant-Respondent.

ORDER DENYING PETITION FOR REHEARING

The Respondent having filed a PETITION FOR REHEARING on January 10, 1989 and supporting BRIEF on January 30, 1989, of the Court's Opinion released December 22, 1988; therefore, after due consideration,

IT IS HEREBY ORDERED that Respondent's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 19th day of April, 1989.

By Order of the Supreme Court

/s/ Frederick C. Lyon
FREDERICK C. LYON, Clerk

cc: Counsel of Record
District Court Clerk
District Judge James Judd

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. A-5

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner

v.

THARON RAWSON, ETC., *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including August 17, 1989.

/s/ Sandra Day O'Connor
Associate Justice of the
Supreme Court of the
United States

Dated this 12th day of July, 1989.

APPENDIX I

SUPREME COURT OF THE UNITED STATES

No. A-5

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner

v.

THARON RAWSON, ETC., *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended further to and including August 24, 1989.

/s/ Sandra Day O'Connor
Associate Justice of the
Supreme Court of the
United States

Dated this 9th day of August, 1989.

APPENDIX J

Excerpt from the Collective Bargaining Agreement
dated March 11, 1970, between the
Sunshine Mining Company
and the United Steelworkers of America

ARTICLE IX

SAFETY AND HEALTH

1. The Company and the Union will continue to cooperate toward the objective of eliminating accident and health hazards. The Company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment. Protective devices, wearing apparel, and other equipment necessary to protect employees from injury shall be provided by the Company in accordance with practices now prevailing in each separate department or as such practices may be improved from time to time by the Company.

2. An employee who believes that he is being required to work under conditions which are unsafe beyond the normal hazards inherent in the operation in question, may request an immediate meeting with the shift boss, with or without consultation with his Assistant Grievance Committeeman. If, as a result of these actions, the employee still believes he is being required to work under conditions which are unsafe beyond the normal hazards inherent in the operation in question, a committee consisting of two (2) supervisory personnel and two (2) reliable employees, approved by the Union, shall inspect the operation in question within twenty-four (24) hours and shall decide what steps, if any, are necessary to correct the hazard.

In the event the Committee cannot agree, the employee involved may then file a grievance in Step 2 of the grievance procedure. It is understood and agreed that if a grievance is filed on an unsafe working condition, management and Union representatives shall give said grievance preferred handling, and shall expedite its movements through the grievance procedure.

The employee may on request, be relieved from the job and be assigned to other work at the discretion of the Company. If an employee exercises his rights under this section and the Company believes conditions are not beyond the normal hazards inherent in the operation in question, nothing contained in this section shall abridge the rights of the Company under other sections of this Agreement.

Neither shall the foregoing preclude the Company from assigning another employee to the job in question and it is further understood that no employee, other than communicating the facts, shall take any steps to prevent another from working on the job.

3. A Safety Committee consisting of three employees designated by the Union and three Management members designated by the Company shall be established. By mutual agreement, the committee may be increased to not more than six representatives for each party. The safety committee shall hold regular meetings at times determined by the committee. The function of the safety committee shall be to advise with the Plant Manager concerning safety and health matters but not to handle grievances. In the discharge of its function the safety committee shall: Consider existing practices and rules relating to safety and health, formulate suggested changes in existing practices and rules, and recommend adoption of new practices and rules. Advices of the safety committee, together with supporting suggestions, recommendations and reasons shall be submitted to the Plant Manager for his consideration and for such action as he may consider consistent with the Company's responsibility to provide for the safety and health of its employees during the hours of their employment and the mutual objectives set forth in Section 1.

4. A Union member and a Management member of the safety committee may accompany the State Mine Inspector or his Deputy, on any inspection made at the property.

5. Two men shall be designated by the Union to accompany the Safety Engineer on tours of the mine. Once each month, one of these two men, together with the Safety Engineer, shall make a tour of a section of the mine. The results of this tour shall be considered at the following Union-Management safety committee meeting.

6. In the event a recommendation with respect to safety conditions that needs action immediately, concurred in by a majority of the entire committee, is not carried out, the Union may have recourse to the grievance procedure.

No. 89-322

Supreme Court, U.S.
FILED
SEP 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioner,

v.

THARON RAWSON, Individually and as Guardian Ad Litem for SETH RAWSON and CINDY RAWSON; BERNIECE JOHNSON, Individually and as Guardian Ad Litem for MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON and JOHN RUSSEL JOHNSON; LAURA DUNBAR, as Guardian Ad Litem for RICKINA ROSSITER and GLEN ROSSITER, JR.; and MARY WOOD, as Guardian Ad Litem for LESLIE D. WOOD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether §301 of the Labor Management Relations Act preempts a state tort claim for the negligent conduct and acts of the United Steelworkers Union, which occurred during the Union's safety inspection of the Sunshine Mine.

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No. 89-322

In The

Supreme Court of the United States

October Term, 1989

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioner,

v.

THARON RAWSON, Individually and as Guardian Ad Litem for SETH RAWSON and CINDY RAWSON; BERNIECE JOHNSON, Individually and as Guardian Ad Litem for MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON and JOHN RUSSEL JOHNSON; LAURA DUNBAR, as Guardian Ad Litem for RICKINA ROSSITER and GLEN ROSSITER, JR.; and MARY WOOD, as Guardian Ad Litem for LESLIE D. WOOD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents, Tharon Rawson, individually and as Guardian Ad Litem for Seth Rawson and Cindy Rawson; Berniece Johnson, individually and as Guardian Ad Litem for Michael Wayne Johnson, Ruth Ellen Johnson and John Russel Johnson; Laura Dunbar, individually and as Guardian Ad Litem for Rickina Rossiter and Glen Rossiter, Jr.; and Mary Wood, individually and as Guardian Ad Litem for Leslie D. Wood, oppose the Petitioner's

request for Writ of Certiorari to the Supreme Court, and file this Brief setting forth the reasons for their opposition.

STATEMENT OF THE CASE

On May 2, 1972, a fire broke out in the Sunshine Mine which claimed the lives of 91 workmen who were on duty. This action was brought on behalf of the heirs and children of four of those mine workers who died in the disaster. The four decedents in this case, John Rawson, Glen Rossiter, Wayne Johnson and Donald Wood were all working underground on the day of the fire. The decedents were members of the United Steelworkers of America, Local 5089, on the day they died.

The underlying action asserts the right to recover from the Petitioner for the wrongful death of these four men pursuant to Idaho Code § 5-311. Idaho Code § 5-311 provides:

> § 5-311. **Action for wrongful death** – When a death of a person . . . is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all circumstances of the case may be just.

Respondent's Complaint is couched in terms of negligence and fraud.[1]

COURSE OF PROCEEDINGS

In 1975 Petitioner Union moved for summary judgment on the grounds that Respondents' cause of action was preempted by § 9(a) of the National Labor Relations Act of 1935[2] and § 301 of the Labor Management Relations Act of 1947.[3]

The trial court granted the Union's motion on federal preemption grounds on January 29, 1976. (Pet.App.F. pp.161a-164a). The Idaho Supreme Court overruled the trial court's grant of summary judgment in *Dunbar v. United Steelworkers of America*, 100 Idaho 523, 602 P.2d 21 (1979). (Pet.App.E. pp.107a-160a). The court addressed the preemption issue as follows:

> Plaintiffs-appellants' claims are not necessarily based on the violation of the duty of fair representation and such is not the only duty owed by a union to its members. Further, we believe that even assuming the claims of plaintiffs-appellants fall within the general scope of the doctrine of preemption, nevertheless we deem it

---

[1] Respondents' fraud claim did not survive review by the Idaho Supreme Court. *Rawson v. United Steelworkers*, 111 Idaho 630, 716 P.2d 742 (1986).

[2] 29 U.S.C. § 159(a).

[3] 29 U.S.C. § 185.

> clear that the case also falls within the narrow exceptions to that same preemption doctrine which were described in Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977).

Pet.App.E. p.112a.

> We are cited to no authority which indicates that the duty of fair representation encompasses or displaces those duties created by a state law which requires a person, corporation or an unincorporated association, to refrain from engaging in wrongful conduct which results in death or injury to person or property. . . . If a Union's unreasonable *conduct* results in the death of one of its members, it should not be excused from liability because of the legal fortuity of its organizational status anymore than if its conduct brought death to a nonunion member.

Pet.App.E. p.114a. (Emphasis added).

> We believe the interests protected by state wrongful death statutes are unrelated to those governed by federal labor laws and we ascertain no conflict which will necessarily arise between the state and federal authorities as a result of permitting such traditional litigation in the state courts. We are cited to no authority which would permit the National Labor Relations Board to take cognizance of wrongful death claims against unions. We are cited to no authority holding that it may be fairly inferred that Congress meant to deprive the states of their powers of determining litigation brought under state wrongful death statutes. *See* Helton v. Hake, 386 F.Supp. 1027 (W.D. Mo. 1974); W. Prosser, Law of Torts § 127 (4th ed. 1971).

Pet.App.E. pp.115a-116a.

Subsequent to the court's remand in *Dunbar, supra,* the Petitioner Union again moved for summary judgment claiming that the facts of the case failed to establish any duty on behalf of the Union to its members and again raising the federal preemption issue. The trial court again granted summary judgment for the Union specifically disagreeing with the Idaho Supreme Court's ruling in *Dunbar* and requesting that the court "reconsider its previous holding." (Pet.App.D. p.102a).

Upon appeal of this dismissal, the court initially affirmed the trial court's ruling. (Pet.App.C. pp.49a-88a). Appellants moved for rehearing on their negligence claim. Upon rehearing the Idaho Supreme Court reversed the trial court's grant of summary judgment concerning the Plaintiffs' negligence claim and remanded the case for further proceedings. (Pet.App.B. pp.13a-48a).

The court acknowledged that the Union's *actions* characterized the basis of the negligence in Respondents' claim – not any contractual obligations. The court stated:

> Moreover, the characterization of the Miners' claim as one for mere nonfeasance which did not increase the risk of harm is incorrect. As the analysis below will demonstrate, the Union, through its representatives, did embark upon safety inspections, and the issue is whether they negligently *performed* their *undertaking*, or whether the Union's negligent *performance* resulted in the men being subjected to increased hazards or potential for death on the date of the fire and explosion that would otherwise have been the situation had the inspections been *performed* without negligence.

. . . .

> T]he Miners' cause is not premised on either a claim that the Union should perform management's safety functions or that the Union should make the workplace safe – rather, *the cause of action is premised upon the Union negligently performing* those safety *functions which it did, in fact, undertake.*

Pet.App.B. p.23a. (Emphasis added).

The court further noted:

> The Miners assert that evidence was presented to establish the following:
>
> (1) John Rawson, Glen Rossiter, Wayne Johnson and Don Wood did not have the use of self-rescuers (oxygen masks and cannisters);
>
> (2) Self-rescuers were stored in boxes with padlocks;
>
> (3) Some of the self-rescuers were eighteen years of age and were corroded so that the valve could not be turned to operate them;
>
> (4) Some of the self-rescuers were inoperative and others were used by miners who sensed them getting hot and discarded them not knowing that the development of heat was an indication that the self-rescuer was working;
>
> (5) The miners did not know how to use self-rescuers that may have been available and had not been trained in their use;
>
> (6) No self-rescuers were stored at the 5,400 level where John Rawson and Glen Rossiter were stationed; at other levels there were fewer cannisters than the usual number of men working at those levels; and that there were only six

> units at the major escape route at the 3,100 foot level.
>
> (7) There were no periodic fire drills or evacuation drills for miners working underground;
>
> (8) There were no opportunities for the miners under controlled circumstances to become familiar with proper exit procedures and sequences; and
>
> . . . .
>
> The Miners contend that most of these deficiencies could have been observed, and should have been observed, in the course of a reasonable inspection and, further, that recommendations could have, and should have, been made with regard to these deficiencies. A reasonable inference which the trial court should have drawn in favor of the miners is that the inspecting personnel were negligent in not seeing and reporting some of these conditions.
>
> . . . .
>
> Because the Union, . . . [had] *in fact, inspected* the mine, it owed the (minimal) duty to its members to exercise due care in inspecting and in reporting the findings of its inspection.

Pet.App.B. p.27a-29a. (Emphasis added).

> Our narrow holding today is that the *Union, having inspected,* assumed a duty to use due care in inspecting and, from the duty to use due care in inspecting arose further duty to advise the committee of any safety problems the inspection revealed. Moreover, since an action for wrongful

> death is a creature of our Idaho statute, is of substantial local interest, and traditionally has been committed to the jurisdiction of the courts of the state, and because *the instant action does not require an interpretation of the terms of the collective bargaining agreement*, we do not consider it to be preempted by federal law.

Pet.App.B. p.34a. (Emphasis added).

The Union thereafter petitioned this Court for a Writ of Certiorari. The Court granted certiorari and remanded *Rawson* for further consideration in light of the recently published case of *IBEW v. Hechler*, 481 U.S. 851 (1987). *See, Rawson*, 482 U.S. 901 (1987).

Upon remand the Idaho Supreme Court reconsidered *Rawson* regarding the sole issue directed by this Court:

> [W]hether the state-law tort actions of the plaintiffs herein are preempted by § 301 of the Labor Management Relations Act of 1947. . . .

Pet.App.A. p.3a.

The Idaho Supreme Court affirmed its opinion in *Rawson* regarding federal preemption, distinguishing it from the substantially different issue presented by the Court in *Hechler, supra*. (Pet.App.A. p.3a). The Union again seeks certiorari on the issue of preemption in order to overturn the Idaho Supreme Court's final determination in *Rawson*.

ARGUMENT

Petitioner contends that "the Idaho Supreme Court's decision on remand is inconsistent with this Court's decision in *Hechler* . . . " and "displays an unremitting hostility to federal preemption." (Pet. for Writ of Cert., p. 21).

Respondent miners assert that the state tort claim in *Rawson* is "'independent' of the collective-bargaining agreement," *Lingle v. Norge Div. of Magic Chef, Inc.*, ___ U.S.___, 108 S. Ct. 1877 (1988); further, *Rawson* is distinguishable from *Hechler, supra*.

In *Rawson* the court is not faced with looking at the Collective Bargaining Agreement (hereafter C.B.A.) in order to interpret whether any duty was imposed by contract. *Rawson* only requires an examination of the *act* or *conduct* of the Union regardless of why the act was undertaken and regardless of whether the act conformed with any contract provision. Since the Union *undertook to inspect*, and *neligently performed* that duty, this is an issue "independent" of the C.B.A. and it must be left for the trier of fact at trial to determine whether "that inspection was negligently performed under Idaho tort law." (Pet.App.A. p.5a).

The Idaho court directly addressed the analysis in *Hechler* and appropriately distinguished that case from *Rawson*. In *Hechler* the Respondent conceded that the "nature and scope of the duty of care owed [her] is determined by reference to the collective-bargaining agreement." *Hechler* 481 U.S. at 851, fn.5; (Pet.App.A. p.4a). The Court pointed out at footnote 5 of *Hechler* that it was in her brief to this Court that Respondent argued for the first time that her claim was "not dependent on

any interpretation of the collective-bargaining agreement. . . ." *Id.* The Court concluded that "it is too late in the day for Respondent to present to the Court this new-found legal theory." *Id.* at 864.

As the Idaho Supreme Court noted:

> Thus, the instant case is clearly distinguishable from *Hechler* in that here the state tort basis of the action was not abandoned, but has been pursued consistently both at the trial and appellate levels and the tort exists *without reference* to the collective bargaining agreement.
>
> Accordingly, Hechler is inapposite and does not stand for the proposition that a federal LMRA preemption exists in the instant case.

Pet.App.A. p.7a. (Emphasis added).

The Idaho court's analysis is buttressed by this Court's language in Hechler that:

> Respondent's allegations of negligence assume significance if – and only if the Union, in fact, had assumed the duty of care that the complaint alleges the Union breached.

Hechler, 481 U.S. at 861.

Rawson is premised on the negligence theory that the Union, once performing inspections of the mine had a duty to do so in a non-negligent fashion. It is dramatically different from *Hechler* in which the Union was only alleged to have a contractual duty to engage in inspection or regulation of workplace safety. The Union did *in fact* actively engage in the duty of safety inspection in *Rawson* and it is unnecessary to "reference," let alone *interpret* the

C.B.A. to determine the nature of or extent of the duty owed to the mine workers.

The following discussion in *Hechler* focuses the critical analysis that this Court later illuminated in *Lingle, supra:*

> In *Allis-Chalmers,* the Court applied the rule that a tort claim "inextricably intertwined with consideration of the terms of the labor contract" is pre-empted under § 301, 471 U.S., at 213, and concluded that the claim in *Allis-Chalmers* fell within that category. The employee's allegation there was that his employer and its insurance company intentionally had failed to make required disability payments under a plan negotiated in a collective bargaining agreement, and that, in so doing, they had breached a state law insurance duty to act "in good faith" in paying disability benefits. *Id.,* at 206. The Court observed that any attempt to assess liability on the part of the employer would inevitably involve interpretaion of the underlying collective-bargaining contract. First, the disability plan adopted in the collective-bargaining agreement might itself have included an implied requirement of good faith that the employer breached by its conduct. The Court explained: [I]t is a question of federal contract interpretation whether there was an obligation under this labor contract to provide the payments in a timely manner, and, if so, whether Allis-Chalmers' conduct breached that implied contract provision." *Id.,* at 215. Second, under the relevant state law, the duty of "good faith" on which the plaintiff relied "intrinsically relate[d] to the nature and existence of the contract." *Id.,* at 216. The concept of "good faith" meant "'being faithful to one's duty or obligation,'" *ibid.,* quoting *Hilker v. Western Automobile Ins.*

> Co., 204 Wis. 1, 13, 235 N.W. 413, 414 (1931), and, under state law, that duty was determined primarily by analyzing the responsibilities agreed to by the insurer in the written contract. The Court reasoned: "Because the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, any attempt to assess liability here inevitably will involve contract interpretation." 471 U.S., at 218. Inasmuch as federal law must control the uniform meaning given to contract terms in a collective-bargaining agreement, however, an employee's state-law tort action that necessarily rests on an interpretation of those terms is preempted by § 301. *Id.*, at 218-219.

Hechler, 481 U.S. at 858-859.

The key to whether there is federal preemption under § 301 thus depends on whether it is necessary to *interpret* the C.B.A., as noted in the above language from *Hechler*. There is no issue in *Rawson* whether the Union fulfilled its duty under the C.B.A. Non-compliance or compliance with the terms of .he C.B.A. is irrelevant to the analysis of this case. The focus under the state-based tort action is on the *actions* or *performance* and whether the duty, once undertaken, was negligently performed. Respondents' tort claims do not rely upon nor are they "inextricably intertwined with consideraton of the terms of the labor contract." *Allis-Chalmers*, 471 U.S. at 213.

The Court's decision in *Lingle, supra*, restated a concise history of the critical § 301 cases. With respect to *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962), Justice Stevens, for a unanimous court, noted that this Court was "confronted with a straightforward question of contract *interpretation*. . . ." *Lingle*, ___U.S.___, 108 S.Ct. at 1880.

(Emphasis added). In *Allis-Chalmers* the scope of the contract was "'ascertained from consideration of the contract itself.'" *Id.* at 1881.

In discussing the retaliatory discharge case, *Horton v. Miller Chemical Co.*, 776 F.2d 1351 (CA7 1985), cert. denied, 475 U.S. 1122, 106 S.Ct. 1641, 90 L.Ed.2d 186 (1986), the Court reasoned:

> Each of the *purely factual questions* pertains to the *conduct* of the employee and the *conduct* of the employer. Neither of the elements requires a court to *interpret* any term of a collective-bargaining agreement.

Lingle, 108 S.Ct. at 1882. (Emphasis added).

> Thus, the state-law remedy in this case is "independent" of the collective-bargaining agreement in the sense of "independent" that matters for § 301 pre-emption purposes: *resolution of the state-law claim does not require construing the collective-bargaining agreement.*

Id. (Emphasis added).

> [A]s long as the state-law claim can be resolved without *interpreting* the agreement itself, the claim is "independent" of the agreement for § 301 pre-emption purposes.

Id. at 1883. (Emphasis added).

The Court then specifically expressed the delineation between federal and state functions respecting § 301 preemption:

> Today's decision should make clear that *interpretation* of collective-bargaining agreements remains firmly in the arbitral realm; . . . judges

> can determine state law involving labor management relations only if such questions do not require *construing* collective-bargaining agreements.
>
> Second, there is nothing novel about recognizing that substantive rights in the labor relations context can exist without *interpreting* collective-bargaining agreements.

Id. at 1884. (Emphasis added).

Again, the key distinction the Court expresses is that preemption depends on whether the C.B.A. must be *interpreted* or *construed;* the Court reiterates this notion in its holding and accompanying footnote:

> In sum, we hold that an application of state law is pre-empted by § 301 of the Labor Management Relations Act of 1947 only if such application requires the *interpretation* of a collective-bargaining agreement.[12]

---

[12] . . . Thus, as a general proposition, a state law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state law analysis would not be thereby pre-empted. As we said in *Allis-Chalmers Corp. v. Lueck*, 471 U.S., at 211, 105 S.Ct., at 1911, "not every dispute . . . tangentially involving a provision of a collective-bargaining agreement is pre-empted by § 301.

Id. at 1885. (Emphasis added).

Petitioner relies on various cases to support its petition for certiorari, all of which are distinguishable from

Rawson or superceded by *Lingle*. *Hechler* is distinguishable not only because the *separate* tort claim was first raised on appeal to this Court, but also because *Hechler* involved a case of *nonfeasance* instead of the *misfeasance* that characterizes *Rawson*.

The issue of *nonfeasance* versus *misfeasance* is not new to Idaho law. Huntley, J., makes the following reference in his analysis in the majority opinion of *Rawson:*

> Recently, in Carroll v. United Steelworkers of America, 107 Idaho 717, 692 P.2d 361 (1984), the Court ruled that mere nonfeasance, even if it amounted to willful neglect to perform a contract, is insufficient to establish duty in tort. In *Carroll*, a Union member accused his Union of *failing to perform* protective actions relative to conducting safety inspections at the work site, but did not allege negligent performance of those actions once undertaken. In *Carroll*, no inspections were made. In the instant case, by contrast, the safety committee did inspect the mine and the miners allege *not* that the Union members of the safety committee *failed* to inspect, but that they actually performed the duty of inspection in a negligent manner and failed to report what should have been obvious safety problems, the duty to report necessarily flowing from the act of inspection. Hence the instant case does not present a situation of nonfeasance, but of malfeasance.

Pet.App.B. pp.23a-24a. (Emphasis added).

Petitioner relies upon *Condon v. Local 2944, United Steelworkers, Etc.*, 683 F.2d 590 (1982), a *nonfeasance* case:

> Appellant has failed to demonstrate that any material factual issues exist as to whether Local undertook any such duty. He was afforded ample notice and opportunity to produce such

> evidence, if he had any. We, therefore, conclude that there is no genuine issue of material fact and that Local is entitled to judgment on all counts as a matter of law.

Condon, 683 F.2d at 596.

Petitioner also relies upon *Richardson v. United Steelworkers of America*, 864 F.2d 1162 (5th Cir. 1989). Therein the Court noted:

> The duty which the Union allegedly breached is described in the original petition as "a duty" which the Union had "[a]s the bargaining agent for Plaintiffs" (emphasis added). No other source of duty is alleged in the original petition.

Id. at 1165. The court appropriately noted that *Richardson*, like *Hechler*, "does not present the question of whether the Union was subject to 'an independent state-law duty of care . . . arising simply from the relationship of a union to its members.' " *Id.* at 1167, citing *Hechler*. In *Richardson* the Plaintiffs did not allege "any breach of a state tort duty that exists independently of the NLRA-established collective bargaining relationship . . . ." *Id.*

Contrary to Petitioner's claims regarding preemption in this case, *Rawson* is indistinguishable from *Linn v. United Plant Guard Wkrs. of Amer., Loc 114*, 383 U.S. 53 (1966), and *Farmer v. United Broth. of C. & J. of America, Local 25*, 430 U.S. 290 (1977), for the purpose of preemption analysis. *Linn* addressed the tort of defamation of character and *Farmer* addressed the tort of intentional infliction of emotional distress; both cases involved tort actions distinct from the C.B.A. Without detailing the valuable analysis of these opinions, the critical similarity between *Linn*, *Farmer* and *Rawson* is that all three cases

involved an overt *act* characterized as either a *misfeasance* or *malfeasance*, whereas *Hechler* was a pure and simple case of *nonfeasance* which required an analysis of the C.B.A. to define the duty.

As this Court recognized in *Allis-Chalmers*, *supra*, Congress never intended for national labor law to preempt all state law claims. This is particularly true in *Rawson*, as in *Farmer*, in which "the Board would lack authority to provide the defamed individual with damages or other relief." *Linn*, 97 S.Ct. at 1062. To preempt Respondents' claims herein literally leaves them without remedy against an active tortfeasor whose misfeasance has caused the loss of life. Perhaps the most compelling argument against preemption in *Rawson* is that there exists no available remedy under national labor law for the damages suffered by the miners' widows and children. What the Union demands in its Petition for Writ of Certiorari is tort immunity for labor unions tantamount to sovereign immunity not even enjoyed by the Federal Government.

The analysis in *Lingle* establishes the appropriate guidelines for assessing whether a C.B.A. must be *interpreted* to grant relief or whether a state cause of action is *independent* of federal labor concerns. There is no need to further define the preemption analysis in *Lingle* by granting a Writ of Certiorari in *Rawson*.

CONCLUSION

In light of this Court's analysis in *Hechler* and *Lingle*, and in light of the Idaho Supreme Court's analysis distinguishing *Rawson* and *Hechler*, there is no substance to Petitioner's request that certiorari be granted in this matter. The facts in *Rawson* are *independent* of federal labor law concerns and preemption is therefore inappropriate. Since the law is well-settled with regard to this case, Respondents pray that Petitioner's Writ of Certiorari be summarily denied.

RESPECTFULLY SUBMITTED,

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No. 89-322

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

THARON RAWSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR SETH RAWSON AND CINDY RAWSON; BERNIECE JOHNSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON AND JOHN RUSSEL JOHNSON; LAURA DUNBAR, AS GUARDIAN AD LITEM FOR RICKINA ROSSITER AND GLEN ROSSITER, JR.; AND MARY WOOD, AS GUARDIAN AD LITEM FOR LESLIE D. WOOD,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Idaho

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PETITIONER'S REPLY BRIEF

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On Petition for Writ of Certiorari to the Supreme Court of Idaho

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PETITIONER'S REPLY BRIEF

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1. In reply to respondents' opposition, it is important at the outset to make clear what is, and what is not, at issue in this case. Respondents' opposition never joins issue with the legal questions presented in our petition. Rather, respondents rest their opposition on a characterization of the case apparently designed to avoid those questions. Thus, respondents repeatedly assert or suggest that this case is about negligent "actions" by the union. Br. in Opp. at 5; *see also* 9, 10, 12, 15, 16-17. In respondents'

words, this case "involve[s] an overt *act* characterized as either a *misfeasance* or *malfeasance*." *Id.* at 16-17 (emphasis in original).

Based on that characterization, respondents assert a legal proposition with which we do *not* disagree: If a union official, in the course of carrying out *any* union function, commits an affirmative act of negligence that increases the risk of harm to persons or property or creates a risk of harm that did not otherwise exist, the union may be liable for resulting injuries in a state-law tort action. For example, if a union official, in the course of investigating a grievance, negligently operates a motor vehicle, causing injury to person or property, federal law would not preempt a state-law tort claim against the union based on that negligent conduct. Similarly, a state tort claim against a union would not be preempted where a union official, in the course of accompanying a company or state inspector on an inspection of a workplace, attempts to repair a piece of equipment and does so negligently, thereby causing the equipment later to malfunction and injure its operator.

But that proposition has no application to this case. While respondents use words like "overt act" and "malfeasance," nowhere in their opposition do they identify any such union conduct. In fact, throughout the many years of this litigation, respondents have never alleged, and have never presented any evidence, that the union here did anything that created a risk of harm or that increased any preexisting risk of harm.

In this regard, the facts as to what the union did or did not do in this case are simple and are *not* in dispute. First, the union entered into a contract with the company, which permitted the union to designate a representative "to accompany" the company's safety engineer on the engineer's monthly "tour of a section of the mine" (171a; see also Pet. at 4). The contract also permitted a

union representative to "accompany" the State Mine Inspector on any state inspection of the mine (*id.*). The agreement gave the union no authority to change safety practices in the mine; rather, union representatives, through a joint labor-management safety committee, were permitted by the contract only to submit "advices," "suggestions [and] recommendations" to the plant manager "for his consideration and for such action as he may consider consistent with the Company's responsibility to provide for the safety and health of its employees . . ." (170a-171a). Second, the union on at least some occasions exercised this contractual right to accompany a company engineer or state inspector. Third, there is no evidence, or allegation, that any union representative committed any affirmative act of negligence in the course of accompanying these inspectors.

As the opinion of the Supreme Court of Idaho—as well as respondents' complaint and respondents' opposition in this Court—makes clear, the alleged negligence here consists entirely of actions the union might have taken, but did not take, that might have led to the correction or mitigation of certain safety "deficiencies" that already were present in the mine and that purportedly contributed to the mine disaster. (27a-29a; Pet. at 5-6; see also Br. in Opp. at 6-7.) In the words of the Supreme Court of Idaho:

> The Miners contend that most of these deficiencies could have been observed, and should have been observed, in the course of a reasonable inspection and, further, that recommendations could have, and should have, been made with regard to these deficiencies.

(28a-29a; see also Br. in Opp. at 7.)

The two federal questions presented in our petition are thus squarely raised. The first question is clearly framed by what we have said to this point: Whether the federal

duty of fair representation preempts a state-law tort action that is based solely on the union's alleged failure to take certain actions in the course of exercising its authority to enforce the safety provisions of the collective bargaining agreement.

The second question is equally straightforward. Respondents and the court below assert that the union "undertook" a duty to inspect. (6a; Br. in Opp. at 9-10.) But such an undertaking could only be found in the collective bargaining agreement. Absent a contractually imposed duty to inspect, a union does not have a general duty to discover and report safety hazards; and a state could not impose such a duty consistent with federal labor law. Accordingly, the second question here is also directly presented: whether federal law—in particular, § 301 of the Labor Management Relations Act—preempts state law on the disputed question of whether the collective bargaining agreement imposed a duty upon the union to discover and report safety hazards.

2. In their opposition, respondents do not directly address the first question presented in the petition. Respondents do not dispute the preemptive effect of the duty of fair representation, or the importance of the duty's application to union activities related to safety, or the need for this Court to address that question in this case. Two points, however, merit a brief reply.

First, lest respondents' opposition raise any confusion on the point, it is important to make clear that the issue of how to characterize the union's activities in connection with inspections has no relevance to the first question presented in the petition. The question of duty of fair representation preemption is squarely raised whether the union "inspected" the mine or whether the union only "accompanied" those who inspected the mine. Whatever the characterization, the undisputed facts are that the union was engaged in the activities that were authorized by the safety article of the collective bargaining agreement, and that it was doing so solely in its capacity as exclusive bargaining representative for the miners. The only allegations of negligence, as we have already noted, are that in the course of those activities the union failed to identify certain hazards or call them to the attention of the company. The trial court found, and the Idaho Supreme Court did not disagree, that the claims against the union were based solely on the union's "representational duties" and "the manner in which the Union carried out the collective bargaining agreement." *See* Pet. at 7. The question whether the duty of fair representation sets the only standard by which that conduct can be judged, or whether state law can set different or additional standards of conduct that the union must meet, cannot depend to any degree on whether the union's activities are characterized as "inspecting" or as merely "accompanying an inspector."

Second, although they do not directly discuss the first question presented, respondents do purport to offer a distinction between the decision in *Condon v. Local 2944, United Steelworkers of America*, 683 F.2d 590 (1st Cir. 1982) and the decision below. Without explaining the relevance of the asserted distinction, respondents state that *Condon* was "a *nonfeasance* case," rather than a "misfeasance" case, which they say this case is. Br. in Opp. at 15. Putting aside whether those characterizations are correct, this is a distinction without a difference. Whatever significance the distinction between nonfeasance and misfeasance may have for Idaho law, *id.*, it has no significance for the principles that underlie the federal duty of fair representation. This Court has never drawn a distinction between "nonfeasance" and "misfeasance" either in defining a union's duty of fair representation or in drawing the bounds of federal preemption.

In any event, the opinion in *Condon* leaves no doubt that that case conflicts squarely with the decision of the Supreme Court of Idaho on the first question presented. The First Circuit stated:

> The thrust of appellant's argument as to Counts V and VI is that, under New Hampshire law, one who undertakes to fulfill a safety monitoring function, whether gratuitously or for consideration, has a duty to exercise reasonable care under the circumstances and may be held liable to a third party for failing to carry out that duty. . . . According to appellant, Local undertook such a duty, and this duty arose independent of Local's obligations under the collective bargaining agreement.
>
> The collective bargaining agreement cannot so cavalierly be pushed aside. Without the collective bargaining agreement, there would be neither a local union nor a union safety committee.
>
> • • • •
>
> The Supreme Court has observed that in certain areas state law may constitute an impermissible obstacle to the accomplishment of the purposes of Congress by regulating conduct that federal law has chosen to leave unregulated. . . . A union's rights and duties as the exclusive bargaining agent in carrying out its representational functions is precisely such an area; Congress has "occupied th[e] field and closed it to state regulation." . . .
>
> We . . . conclude that a union cannot be held liable for the negligent performance of a duty it assumed that arose inextricably, as here, from the safety and health provisions of a collective bargaining agreement.

683 F.2d at 594-95.[1]

[1] Indeed, the claim in *Condon* presents a striking parallel to the claim in this case. The plaintiff in *Condon* was burned when sparks from a welding torch set his shirt on fire. *Id.* at 591. He alleged that the union had "negligently failed to carry out" its alleged duty "to ensure that the equipment on the premises was in a safe operating condition and that sufficient fire safety equipment was available." *Id.* at 592-93. These allegations are, for all practical purposes, identical to respondents' allegations that the union in this case negligently "failed to require" fire drills, personal protective equipment, and adequate emergency egress from the mine. See Pet. at 6, Br. in Opp. at 6-7.

3. Respondents suggest that because the union in this case was "an active tortfeasor," the preemption questions are governed by *Linn v. Plant Guard Workers Local 144*, 383 U.S. 53 (1966), and *Farmer v. Carpenters Local 25*, 430 U.S. 290 (1977). Br. in Opp. at 16-17. As we have shown, the label "active tortfeasor" cannot accurately be applied to the allegations of negligence in this case. But even if the label were appropriate, those allegations of negligence do not rise to the level of the intentional torts that this Court allowed state law to redress in *Linn* and *Farmer*.

In *Linn* the Court held that state-law claims for "malicious libels," 383 U.S. at 61, are not preempted, so long as they are limited "to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage," *id.* at 65. In *Farmer* the Court allowed a state-law claim for intentional infliction of emotional distress, emphasizing that liability could be established only upon "proof that the defendant intentionally engaged in outrageous conduct causing the plaintiff to sustain mental distress." 430 U.S. at 304. The state-law claims in *Linn* and *Farmer* are thus entirely different from respondents' allegations that the union negligently failed to observe and report preexisting hazards in the mine.

4. Respondents suggest that this Court's decision in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S. Ct. 1877 (1988), is somehow determinative in this case. Br. in Opp. at 9, 12-13, 17. As we show, however, the only bearing *Lingle* has on this case is that it reconfirms the analysis of this Court's decision in *IBEW v. Hechler*, 481 U.S. 851 (1987), on which we rely in connection with the second question presented.

First, *Lingle* has no bearing on the first question presented by our petition—whether the duty of fair representation independently preempts respondents' state-law claim. *Lingle* addresses only the preemptive effect of § 301; as the *Lingle* Court stated in its opinion, *Lingle* has no bearing on other aspects of federal labor-law preemption:

> Although § 301 pre-empts state law only insofar as resolution of the state-law claim requires the interpretation of a collective-bargaining agreement, and although § 301 pre-emption is all that is at issue in this case, it is important to remember that other federal labor law principles may pre-empt state law.

108 S. Ct. at 1883 n.8.

On the second question presented in our petition, *Lingle* simply confirms the analysis on which we have relied. The question in *Lingle* was whether § 301 preempted a state-law tort claim that was based on allegations that the plaintiff's employer had fired her in retaliation for filing a workers' compensation claim. Although the plaintiff was also covered by a collective bargaining agreement that protected her from discharge except for "just cause," the Court held that § 301 did not preempt the state-law claim because the state claim was "'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement." *Id.* at 1882.

This case does not resemble *Lingle* at all. This is not a case where the state tort action can proceed and be resolved without any reference to the terms of the collective bargaining agreement. Instead, it is just like *Heckler*, where the union is alleged to have assumed a duty under state tort law by virtue of the terms of a collective bargaining agreement, and where therefore, as the Idaho

Supreme Court acknowledged before *Hechler* was decided, the "nature and scope of the Union's duty" are defined by that collective bargaining agreement (33a). Respondents contend that the agreement created a duty to "inspect" the mine; the union contends that the agreement gave it a right, but not a duty, to perform a far more limited function—*i.e.*, to "accompany" those who did have a duty to inspect the mine. Pet. at 3-4, 23-24; *see also*, p. 2-3, *supra*. The scope of the union's duty, if any, in connection with inspections of the mine is necessarily dependent on what the agreement authorized the union to do, and that question could not be decided without interpreting the disputed provisions of the agreement.

The Idaho Supreme Court attempted to avoid the force of *Hechler* by asserting that the union had "conceded" that it had undertaken to inspect the mine. As we showed in our petition, there was no such concession. Pet. at 9-10, 22. Indeed, the only evidence on the summary judgment record of what the union was actually doing in connection with inspections was that it was doing only what the agreement authorized. Pet. at 9, 23-24. Significantly, respondents make no attempt to defend the assertion that there was such a concession. Rather, they simply assert, without any record support, that the union "did in fact actively engage in the duty of safety inspection." Br. in Opp. 10. Section 301 preemption cannot be avoided either by pretending that the union made a concession it did not make or by pretending that there is evidence that the union was engaged in inspecting. The facts on this point are not in dispute: union representatives were present during some inspections of the mine. What is in dispute is the function of those representatives: were they carrying out a duty to "inspect" the mine or were they exercising the union's right to "accompany" those who were inspecting the mine. That dispute cannot be resolved without interpreting the collective bargaining agreement.

CONCLUSION

For these reasons, and for the reasons stated in the petition, the petition for writ of certiorari should be granted to review the judgment of the Supreme Court of Idaho.

Respectfully submitted,

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No. 89-322

FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

THARON RAWSON, Individually and as Guardian Ad Litem for SETH RAWSON and CINDY RAWSON; BERNIECE JOHNSON, Individually and as Guardian Ad Litem for MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON and JOHN RUSSEL JOHNSON; LAURA DUNBAR, as Guardian Ad Litem for RICKINA ROSSITER and GLEN ROSSITER, JR.; and MARY WOOD, as Guardian Ad Litem for LESLIE D. WOOD,
Respondents.

On Writ of Certiorari to the Supreme Court of Idaho

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 24, 1989
CERTIORARI GRANTED JANUARY 8, 1990

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IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF SHOSHONE

Case No. 17694

THARON RAWSON, Individually and as Guardian ad Litem for her minor Children, SETH RAWSON and CINDY RAWSON, heirs of JOHN R. RAWSON, deceased,
Plaintiffs,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association;
and STATE OF IDAHO,
Defendants.

Case No. 17741

BERNIECE JOHNSON, Individually and as Guardian ad Litem for MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON and JOHN RUSSELL JOHNSON, minor children; and CHRISTINE JOHNSON and DONALD JOHNSON, heirs of WAYNE LYLE JOHNSON, deceased,
Plaintiffs,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association;
and STATE OF IDAHO,
Defendants.

Case No. 17742

LAURA DUNBAR, as Guardian ad Litem for RICKINA ROSSITER and GLEN RAYMOND ROSSITER, JR., her minor children, heirs of GLEN RAYMOND ROSSITER, deceased,
Plaintiffs,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association;
and STATE OF IDAHO,
Defendants.

Case No. 18222

MARY WOOD, as Guardian ad Litem for LESLIE D. WOOD, her minor child, heir of DON B. WOOD, deceased,
Plaintiffs,

v.

UNITED STEELWORKERS OF AMERICA, an unincorporated association; and STATE OF IDAHO,
Defendants.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
03-12-73	Complaint in *Rawson*, Civil No-17694 [Substantially identical complaints were filed the same day in *Johnson*, Civil No. 17741, and *Dunbar*, Civil No. 17742]
08-28-73	Answer of Defendant United Steelworkers of America
08-25-75	Motion of Defendant United Steelworkers of America to Dismiss, or, Alternatively, for Summary Judgment
02-02-76	Memorandum Decision and Order [Dated January 29, 1976, granting defendant United Steelworkers of America's Motion for Summary Judgment]
04-01-76	Notice of Appeal
09-14-79	Opinion and Judgment of the Idaho Supreme Court [dated September 13, 1979]
09-12-80	Amended Complaint, Demand for Jury Trial and Motion for Maintenance of Class Action in *Rawson*, Civil No. 17694 [Substantially identical amended complaints were filed on the same day in *Johnson*, Civil No-17741, *Dunbar*, Civil No. 17742, and *Wood*, Civil No. 18222]

Date	PROCEEDINGS
10-06-80	Motion to Amend Complaint and Notice of Hearing
07-02-81	Memorandum Opinion [dated June 30, 1981, denying plaintiffs' motion to amend complaint to state a class action, but not ruling on the amendment of the complaint in other respects]
03-31-83	Order in re: Motion to Strike Amended Complaint and Motion to Amend Complaint [denying plaintiffs' motion to amend complaint to add new plaintiffs, but granting plaintiffs' motion to amend complaint as filed on September 12, 1980 to add claims for gross negligence, fraud and constructive fraud]
04-25-83	Defendant's Answer to Amended Complaint
08-15-83	Motion of Defendant United Steelworkers of America, AFL-CIO-CLC, for Summary Judgment or, Alternatively, for Partial Summary Judgment
11-02-83	Order in re: Motion for Summary Judgment [dated November 1, 1983, opinion granting defendant's Motion for Summary Judgment]
11-18-83	Judgment
12-13-83	Notice of Appeal
06-15-89	Motion of Defendant United Steelworkers of America to Stay Proceedings Pending Disposition of its Petition for Writ of Certiorari
09-18-89	Order [granting defendant's Motion to Stay Proceedings subject to modification]

IN THE SUPREME COURT
OF THE STATE OF IDAHO

Case No. 15338

THARON RAWSON, individually and as Guardian ad Litem for her minor Children, SETH RAWSON and CINDY RAWSON, heirs of JOHN R. RAWSON,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

BERNIECE JOHNSON, individually and as Guardian ad Litem for MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON and JOHN RUSSELL JOHNSON,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

LAURA DUNBAR, as Guardian ad Litem for RICKINA ROSSITER and GLEN RAYMOND ROSSITER, JR., minor heirs of GLEN RAYMOND ROSSITER,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

MARY WOOD, as Guardian ad Litem for LESLIE D. WOOD, her minor child, heir of DON B. WOOD, deceased
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
an unincorporated association,
Defendant-Respondent.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
12-23-83	Filed Notice of Appeal
02-24-86	Filed Case Opinion
02-24-86	Appeal Description ** Appeal from an Order Granting Summary Judgment to the United Steelworkers of America in an Action for Wrongful Death. **Affirmed**
03-17-86	Filed Petition for Rehearing by APPS
04-25-86	Entered Order granting Petition for Rehearing filed by Appellants. Granted ** On the single issue discussed in part II of the Opinion concerning the negligence claim**
09-04-86	Filed Substituted Case Opinion on Rehearing. ** 1986 Opinion No. 30, issued 2-24-86, is hereby withdrawn and this Opinion is substituted therefore**
09-04-86	Appeal Description ** Appeal from an Order granting Summary Judgment to the United Steelworkers of America in an action for wrongful death. ** Affirmed in part, reversed in part and remanded**
12-12-86	Filed Notice of Filing Petition for Certiorari in the U.S. Supreme Court

Date	PROCEEDINGS
06-05-87	Filed copy of Letter/Order granting Petition for a Writ of Certiorari. The Judgment is vacated and the case is remanded to the Supreme Court of Idaho
07-23-87	Case reopened per U.S. Supreme Court Order on Remand
07-23-87	Entered Order pursuant to the Mandate of the U.S. Supreme Court that the remittiture heretofore issued by the Court on the 23rd day of October, 1986, be, and it hereby is, vacated and the Court hereby reasserts jurisdiction of this appeal. Ordered that the Appeal will be reheard and reconsidered in light of the opinion in International Brotherhood of Electrical Workers, AFL-CIO v. Hechler, 481 US —— (1987)
12-22-88	Filed case Opinion on Remand from Writ of Certiorari
12-22-88	Appeal description ** on remand from the United States Supreme Court following Grant of Writ of Certiorari on Issue of Preemption under Labor Management Relations Act. Held: Claim under Idaho tort law is not federally preempted
01-10-89	Filed Petition for Rehearing by Respondent
04-19-89	Entered Order Denying Petition filed 1-10-89 for rehearing
09-01-89	Filed Notice of Filing Petition for Certiorari in the U.S. Supreme Court

UNITED STEELWORKERS OF AMERICA

AFL-CIO-CLC

1500 Commonwealth Building
Pittsburgh, PA. 15222

June 16, 1969

TO: ALL LOCAL UNION
RECORDING SECRETARIES

Dear Sir and Brother:

In accordance with the recommendations of the International Executive Board Safety and Health Committee, the Safety and Health Department is now being reorganized. At a later date, Workmen's Compensation will be incorporated in this department.

President Abel has assigned me to direct the department, and Marco Vestich and Adolph Schwartz will serve as my assistants. Jo-Anne Damian will be the Departmental Secretary.

Currently, we are in the process of examining existing policies and formulating new policies and procedures.

The need for high standards in the Safety and Health fields are evident by the following facts. According to the National Safety Council there were more disabling injuries and deaths in the work situation that were due to motor vehicle accidents in the first 6 months of 1967. Furthermore, it is reported that there were roughly 30 times as many people injured at work in the United States as were injured in Vietnam during the same period. In 1966 there were ten times more man days lost due to injury than were lost because of strikes. These figures are startling. However, it has been demonstrated that in those districts of our International Union where a firm Safety and Health program have been adopted the number of cases of industrial accidents and illness have been reduced significantly.

It is our objective to make all the industrial establishments organized by our International Union healthier, and safer places to work.

In a short time you will receive correspondence from this office that will outline the general Safety and Health policy of our International Union, and the procedures that should be taken by our local unions to implement this policy.

Fraternally yours,

/s/ Paul E. Schremp
PAUL E. SCHREMP
Director
Safety and Health Department

UNITED STEELWORKERS OF AMERICA

AFL-CIO-CLC

1500 Commonwealth Building
Pittsburgh, PA. 15222

January 5, 1970

TO: ALL USWA LOCAL UNION
RECORDING SECRETARIES

Dear Sir and Brother:

It is essential to your Safety and Health Department that the enclosed form, "Annual Report" be filled out accurately and promptly, this to ensure prompt responses to inquiries that will come to the Department from all areas within our jurisdiction.

It is well at this point to remember that the jurisdiction of the United Steelworkers of America includes the United States, Canada, Puerto Rico and the Virgin Islands and a membership of 1,200,000.

As stated at the National Safety Conference in Chicago, Illinois, on November 10 and 11, 1969 the procedures and lines of communication so necessary to a successful Safety and Health Program must be maintained at all times.

The proper filling out of the enclosed form will enable your Safety and Health Department to contact the proper people so the best of all service can be rendered to our membership.

In the event the form is not filled out and returned to your Safety and Health Department, it is entirely possible that long delays can be encountered when questions are asked of the Department or when assistance is called for; this, of course, is not in the best interest of the membership we serve.

The questions on the form have much meaning to the Department. In the event the answer to the question: Does your Company bring employees in to work, after an accident and then not assign them anything to do, means, they are cheating on the Frequency and Severity rates. This, perhaps, trying to make a good showing to the home office or to win some type of Safety Award.

In the event your answer shows that your company doesn't keep Frequency or Severity rates indicates to your Safety and Health Department their true regard for accident prevention and the elimination of health hazards.

As stated on the form, in the event you need help in filling out the form, please contact your Staff Representative to help you fill it out.

Please PRINT ALL NAMES AND ADDRESSES on the form.

Return the form to:

Mr. Paul E. Schremp, Director
Safety and Health Department
1500 Commonwealth Building
Pittsburgh, Pennsylvania 15222

UNITED STEELWORKERS OF AMERICA

Safety and Health Department
Annual Report Local Union Safety and Health Committee

(Please Print All Names and Addresses)

Local Union No. _____ District No. _____

Number of Members _____

Staff Representative _____ Phone No. _____

District S & H Co-ordinator _____ Phone No. _____

L. U. President _____ Phone No. _____

L. U. S & H Chairman _____ Phone No. _____

Total number of members on the Safety and Health Committee _____

When does your Contract expire? _____

Name of your Company _____

Products Manufactured _____

Company phone number _____

Does your Company employ an Industrial Engineer or an Industrial Hygienist: Yes ☐ No ☐

Are members of the Safety and Health Committee docked pay while they are investigating Safety and Health Problems for the Local: Yes ☐ No ☐

Does your Company cooperate with your Safety and Health Committee:

Yes ☐ No ☐

In the event the answer is "No" explain on the back of this form.

Does your Company belong to the National Safety Council? Yes ☐ No ☐

Does your Company keep accident frequency and severity rates: Yes ☐ No ☐

If the answer is yes, what are they?
Frequency ———— Severity ————

Does your Company bring employees to work, after an accident and then not assign them anything to do: Yes ☐ No ☐

In the event it is felt that help is needed with this form, we suggest that the Staff Representative be contacted for assistance.

METHOD OF RECORDING AND MEASURING WORK INJURY EXPERIENCE

FREQUENCY-SEVERITY

FREQUENCY RATE

The disabling injury frequency rate is based upon the total number of deaths, permanent total, permanent partial, and temporary total disabilities which occur during the period covered by the rate.

The period covered by the rate can be for a month, quarter, six months or for a year. The rate is determined by use of the following formula:

$$\frac{\text{number of disabling injuries X 1,0000,000}}{\text{employee-hours of exposure}} = \text{Frequency}$$

Let us assume that a plant has 9 disabling injuries during the last six months of the year, then, the frequency rate equals 9 (number of disabling injuries) X 1,000,000 or 9,000,000, divide this product by 3,000,000 (total number of employee-hours worked during the six month period), the frequency in this example is 3.0.

In other words, disabling injuries are occurring at the rate of 3 for each million employee-hours worked.

SEVERITY RATE

The disabling injury severity rate is based on the total of all scheduled charges for all deaths, permanent total, and permanent partial disabilities, plus the total days of disability from all temporary total injuries which occur during the period covered by the rate.

The period covered by the rate, for severity calculation, can be for the same periods of time as for the frequency calculation purposes. This rate is determined by use of the following formula:

$$\frac{\text{total days charged X 1,000,000}}{\text{employee-hours of exposure}} = \text{Severity}$$

Let us assume that a plant had the following injury experience during a year.

One fatality, specific charge 6,000 days. One permanent partial disability, (50 per cent loss of use of the index finger), specific charge 200 days. Five temporary total disabilities, 100 days specific charge. Total days charged 6,300. During this period of time the plant worked 2,100,000 hours, 6,300 X 1,000,000 = 6,300,000,000 divide this product by 2,100,000, the man hours worked, gives a severity of 3,000.

COLLECTIVE BARGAINING AGREEMENT DATED MARCH 11, 1970 BETWEEN THE SUNSHINE MINING COMPANY AND THE UNITED STEELWORKERS OF AMERICA

AGREEMENT

THIS AGREEMENT, made and entered into this 11th day of March, 1970, is by and between SUNSHINE MINING COMPANY (hereinafter referred to as the "COMPANY") and the UNITED STEELWORKERS OF AMERICA, and its LOCAL 5089 (hereinafter referred to as the "UNION") as the bargaining representatives of the Employees of SUNSHINE MINING COMPANY (as hereinafter defined) with respect to the Company's operation known as the "SUNSHINE MINE", located on Big Creek, Shoshone County, Idaho.

ARTICLE I

Purpose and Intent of the Parties

The purpose of this Agreement is to set forth rates of pay, hours of work and other conditions of employment to promote orderly and peaceful relations between the Company and its employees, to achieve uninterrupted production from the Company's operation and to achieve the highest level of employee performance and compensation consistent with safety, good health and sustained effort.

The Company and the Union encourage the highest possible degree of friendly, cooperative relationships between their respective representatives at all levels and with and between all employees. The officers of the Company and the Union realize that this goal depends on more than words in a labor agreement, that it depends primarily on attitudes between people in their respective organizations and at all levels of responsibility. They believe that proper attitudes must be based on full understanding of and regard for the respective rights and

responsibilities of both the Company and the Union. They believe also that proper attitudes are of major importance in the local plant where day-to-day operations and administration of the Labor Agreement demand fairness and understanding. They believe that these attitudes can be encouraged best when it is made clear that Company and Union officials, whose duties involve negotiation of this Labor Agreement, are not anti-union or anti-company, but are sincerely concerned with the best interests and well-being of the business and all employees.

ARTICLE II

Union Security

1. The Company recognizes the Union as the exclusive bargaining agency for all production and maintenance employees of the Company (excluding all electricians, executive, professional, technical, and clerical employees, guards and supervisors) as defined in the Act and determined by the National Labor Relations Board, Seattle, Washington, Case No. 19-RC-1510 on July 29, 1954. Wherever used in this Agreement, the word "employee" or the word "employees" shall mean members of the foregoing defined unit.

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ARTICLE VII

Grievance and Arbitration

Any question or dispute concerning compliance by either party with, or interpretation or application of this Agreement or concerning wages, hours, and other terms and conditions of employment, shall be treated as a claimed grievance in the sequence outlined as grievance procedure until settled. Should an agreed settlement be lacking at the final stage of the grievance procedure, said claimed grievance may then be referred by either party

to arbitration. The Arbitrator's decisions made within the scope of the submission and authority of the Arbitrator shall be final and binding on all parties.

—Grievance Procedure—

1. Step (1)

   The employee claiming a grievance shall present his case either directly, or through a member of his grievance committee to his immediate supervisor.

   Step (2)

   Failing a settlement, the grievance shall be presented through a member of the grievance committee to the department head.

   Step (3)

   Failing a settlement in Step 2, the grievance shall be submitted in writing by the Grievance Committee Chairman to the Personnel Director. At the conclusion of Step 3, a written statement of the position of the parties upon the written issues presented in Step 3, shall be exchanged by the chairman of the grievance committee and the Personnel Director.

   Step (4)

   If no settlement is reached in Step 3, the grievance will be submitted in writing to the Plant Manager by the Grievance Committee Chairman. At the hearing in this stage, a staff representative of the International Union may be present.

2. A grievance claim may be heard during working hours when necessary.

3. A claimed grievance may originate with the company and this class of grievance shall be taken up in Step 3 of this Grievance Procedure.

4. Grievance claims must be made orally in Step 1 within twenty-four (24) hours of the time the em-

ployee would reasonably be expected to be aware of the incident, excluding Sundays, holidays, scheduled days off, or lost time due to the injury of the claimant on the job. In the event the claimant is off an extended period of time, the grievance must be presented within two (2) weeks of the incident.

If no answer is received from the supervisor within forty-eight (48) hours or settlement fails in Step 1, submission in Step 2 must be made within five (5) days of the presentation of the grievance in Step 1.

If no answer is received within five (5) days of presentation in Step 2, submission to Step 3 must be made in writing within another five (5) days or appeal from the answer in Step 2 must be made in writing to Step 3 within five (5) days after the answer is received. An answer in Step 3 must be given within seven (7) days from the date of submission in Step 3.

Submission in Step 4 must be made in writing within five (5) days after receipt of the answer in Step 3 and a hearing and an answer must be given within another ten (10) days.

The time limitations applicable after presentation in Step 1 are exclusive of Saturdays, Sundays and holidays. Failure on the part of the Union to submit the grievance within the above time limits or on the part of the Company to give an answer in Step 3 or Step 4 within the above time limits unless postponed by mutual agreement in writing between the Grievance Committeeman and Company Official concerned shall forfeit the grievance.

5. Failing a settlement of a claimed grievance in Step 4, either party may refer the matter to arbitration within thirty (30) calendar days after receipt of the answer in Step 4. This 30-day period may be extended by mutual agreement in writing. The parties

will attempt to join in a written submission defining the issue, or issues to be arbitrated, but if the parties are unable to agree on a submission, then each party may file with the Arbitrator, its version and he shall determine the issues, subject always to the scope of this Agreement. The issue or issues to be submitted for arbitration shall be limited to the issue or issues submitted in Step 4 of the grievance procedure.

6. The Arbitrator shall be selected from a list of impartial arbitrators submitted by the Federal Mediation and Conciliation Service.

   From the list submitted by the agency above designated, each party will separately advise the agency of its order of preference by crossing off the names to which he objects and numbering the remaining names in order of preference. Should this procedure fail to result in the appointment of an arbitrator, an additional list or lists shall be requested until an appointment is made.

7. The Arbitrator shall not have the authority to alter or to add to the terms of this Agreement or the wage scales which are a part hereof.

8. The Arbitrator shall not have the authority to go beyond the submission. Any case referred to the Arbitrator on which the Arbitrator has no power or authority to rule shall be referred back without decision.

9. Should the Arbitrator order a discharged employee reinstated, said Arbitrator may order said reinstatement with or without back pay, consistent with the circumstances of the discharge.

10. The expense of the Arbitrator shall be paid half by the Company and half by the Union.

11. The scope of this Article is limited as defined herein and shall not be construed to apply to wage issues (except as provided for in Article III, Section 2), or disagreements of any kind arising out of or in the course of contract negotiations.

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ARTICLE IX

Safety and Health

1. The Company and the Union will continue to cooperate toward the objective of eliminating accident and health hazards. The Company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment. Protective devices, wearing apparel, and other equipment necessary to protect employees from injury shall be provided by the Company in accordance with practices now prevailing in each separate department or as such practices may be improved from time to time by the Company.

2. An employee who believes that he is being required to work under conditions which are unsafe beyond the normal hazards inherent in the operation in question, may request an immediate meeting with the shift boss, with or without consultation with his Assistant Grievance Committeeman. If, as a result of these actions, the employee still believes he is being required to work under conditions which are unsafe beyond the normal hazards inherent in the operation in question, a committee consisting of two (2) supervisory personnel and two (2) reliable employees, approved by the Union, shall inspect the operation in question within twenty-four (24) hours and shall decide what steps, if any, are necessary to correct the hazard.

In the event the committee cannot agree, the employee involved may then file a grievance in Step 2 of the grievance procedure. It is understood and agreed that if a grievance is filed on an unsafe working condition, management and Union representatives shall give said grievance preferred handling, and shall expedite its movements through the grievance procedure.

The employee may on request, be relieved from the job and be assigned to other work at the discretion of the Company. If an employee exercises his rights under this section and the Company believes conditions are not beyond the normal hazards inherent in the operation in question, nothing contained in this section shall abridge the rights of the Company under other sections of this Agreement.

Neither shall the foregoing preclude the Company from assigning another employee to the job in question and it is further understood that no employee, other than communicating the facts, shall take any steps to prevent another from working on the job.

3. A Safety Committee consisting of three employees designated by the Union and three Management members designated by the Company shall be established. By mutual agreement, the committee may be increased to not more than six representatives for each party. The safety committee shall hold regular meetings at times determined by the committee. The function of the safety committee shall be to advise with the Plant Manager concerning safety and health matters but not to handle grievances. In the discharge of its function the safety committee shall: Consider existing practices and rules relating to safety and health, formulate suggested changes in existing practices and rules, and recommend adoption of new practices and rules. Advices of the safety committee, together with supporting sugges-

tions, recommendations and reasons shall be submitted to the Plant Manager for his consideration and for such action as he may consider consistent with the Company's responsibility to provide for the safety and health of its employees during the hours of their employment and the mutual objectives set forth in Section 1.

4. A Union member and a Management member of the safety committee may accompany the State Mine Inspector or his Deputy, on any inspection made at the property.

5. Two men shall be designated by the Union to accompany the Safety Engineer on tours of the mine. Once each month, one of these two men, together with the Safety Engineer, shall make a tour of a section of the mine. The results of this tour shall be considered at the following Union-Management safety committee meeting.

6. In the event a recommendation with respect to safety conditions that needs action immediately, concurred in by a majority of the entire committee, is not carried out, the Union may have recourse to the grievance procedure.

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ARTICLE XVI

General

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2. Employees will be required to conform to all rules and regulations now or hereafter set forth by the Company, provided, however, that such rules and regulations shall not be in conflict with the terms and provisions of this Agreement and provided further that an alleged conflict may be subject to the Grievance and Arbitration Procedure.

3. The management of the Company's property being vested exclusively in the Company, the Company has,

subject to the provisions of this Agreement, the sole direction of the working forces, including among others the right to hire, discipline and discharge for cause, to assign work, to determine qualifications, to effect job changes, to determine the equipment to be used and to expand, curtail, suspend, or resume operations.

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11. The parties specifically waive their rights to request bargaining under Section 8(d) of the Labor-Management Relations Act of 1947 with respect to matters not specifically covered by this Agreement and dealing with wages, hours and other terms and conditions of employment, for the life of this Agreement.

12. This Agreement, which becomes effective as of March 11, 1970, shall remain in full force and effect until twelve P.M. (12:00 P.M.) midnight, March 10, 1973, and shall renew itself for a period of one (1) year, from year to year thereafter unless either party submits a notice of termination in writing to the other party not less than sixty (60) days nor more than ninety (90) days prior to March 11, 1973, or the March 11 expiration date of each year thereafter.

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CONSTITUTION OF INTERNATIONAL UNION UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

Adopted at Atlantic City, N.J., October, 1970

ARTICLE I

Name

This Organization shall be known as the United Steelworkers of America, hereinafter also referred to as the International Union. This document shall be known as the Constitution and By-Laws of the United Steelworkers of America and it shall also be the Constitution of each Local Union chartered by the International Union.

ARTICLE II

Objects

First. To unite in this industrial union, regardless of race, creed, color or nationality, all workers and working men and working women eligible for membership, employed in and around and in transportation related to iron, steel, aluminum, non-ferrous metal and allied manufacturing, mining, processing, and fabricating mills, factories and establishments in the United States and its territories, Canada, and insular areas adjacent thereto.

Second. To establish through collective bargaining adequate wage standards, shorter hours of work and improvements in the conditions of employment for workers in industry.

Third. To engage in educational, legislative, political, civic, social, welfare, community and other activities; to advance and safeguard the economic security and social welfare of workers in industry, the International Union, its Local Unions and the free labor movements of the United States, Canada and the world; to protect and extend our democratic institutions and civil rights and liberties; and to perpetuate and extend the cherished traditions of democracy and social and economic justice in the United States, Canada and the world community.

Fourth. To function as an autonomous International Union affiliated with other international unions in national and international federations in the United States, Canada and the free world, to unify and solidify the International Union, its Local Unions and the entire labor movement, and to provide financial and other aid and assistance to labor and other organizations in the United States, Canada and other parts of the world.

Fifth. To take all steps and actions consistent with the Constitution and policies of the International Union, to implement and carry out the objects, rights, activities and responsibilities of this organization.

ARTICLE VII

Local Unions

Section 1. Ten (10) or more persons eligible for membership in the International Union shall constitute a Local Union upon receipt of a charter from the International Secretary-Treasurer under the terms herein provided.

Sec. 2. Upon approval of the charter application by the International Officers, subject to review by the International Executive Board, the International Secretary-Treasurer shall issue to the applicants a Local Union charter which shall contain such provisions as the International Union may require; he shall also deliver to said applicants one Local Union seal and such other initial supplies as may be necessary to conduct the affairs of the Local Union.

Sec. 3. No Local Union shall be dissolved, except with the approval of the International Executive Board.

Sec. 4. The Local Unions shall be charged with the duty of enforcing this Constitution as affecting their membership.

The funds and property of the Local Union shall be managed, invested, expended or otherwise used to implement and carry out the objects, rights, activities and responsibilities of the Local Union or the International Union, and to administer the affairs of the Local Union, in accordance with the Constitution and policies of the International Union and the By-Laws of the Local Union.

Sec. 5. Local Unions may adopt, subject to approval by the International Union, such by-laws and rules as do not conflict with any of the provisions of this Constitution or the policies of the International Union. Local Unions which do not adopt such by-laws shall be deemed to have adopted the standard By-Laws for Local Unions issued by the International Union.

Notwithstanding any provisions of the Constitution to the contrary, the International Executive Board shall issue rules and special by-laws governing Amalgamated Local Unions.

Notwithstanding any provisions of the Constitution to the contrary, the International Executive Board shall issue special by-laws for Local Unions representing Great Lakes seamen in the lake transportation industry to deal with the special needs, circumstances and conditions of members in this industry on such matters as Local Union and International Union elections, conduct of meetings, formation of committees, duties of Local Union officers, and trial of members.

Sec. 6. Local Unions shall hold a general membership meeting at least once every month.

Sec. 7. All Local Unions are required to affiliate with the appropriate central and local bodies chartered by the Federation.

Sec. 8. All Local Union Officers and Grievance Committeemen shall be elected for a term of three (3) years at the last meeting in June commencing June, 1973 by a

plurality vote of the members participating in a referendum vote, and shall serve until their successors are elected and qualified, at which time all money, official records and documents, and all property belonging to the Local Union shall be turned over to such successors.

The date of Local Union elections for Local Union Officers and Grievance Committeemen must be advertised among members at least fifteen (15) days previous to the date of the election by mailing notice of the date, place and hours of the election to each member in good standing at his last known home address. The notice must also specify the Local Union offices to be filled. Nominations shall be made at the immediately preceding meeting. Notice of the nominations meeting shall be given to the membership at least one (1) week in advance of the meeting.

The requirements regarding method of election and notices may be modified for Local Unions in Canada by the International Executive Board.

No member shall at the same time be a candidate for or hold more than one of the following offices: President, Vice President, Recording Secretary, Financial Secretary, Treasurer, Guide, Guard, and Trustee.

Sec. 9. No member shall be eligible for election as a Local Union Officer or Grievance Committeeman unless

(a) He shall have been in continuous good standing for a period of twenty-four (24) months immediately preceding the election, or if his Local Union has been in existence for a lesser period prior to the election, he must have been in continuous good standing from the time that he joined such Local Union; and

(b) He is employed in a plant or mill or other place within the jurisdiction of the Local Union; and

(c) He has attended at least one-half (½) of the regular meetings of his Local Union for thirty-six (36)

months previous to the June, 1973, election, unless his Union activities or working hours prevented his attendance.

Sec. 10. A Workmen's Compensation Committee and a Safety and Health Committee, under the direction of the International Union or its designated representative, shall be established in each Local Union.

Sec. 11. A Civil Rights Committee, under the direction of the International Union or its designated representative, shall be established in each Local Union to implement our Union's commitment to the protection and extension of civil rights and liberties.

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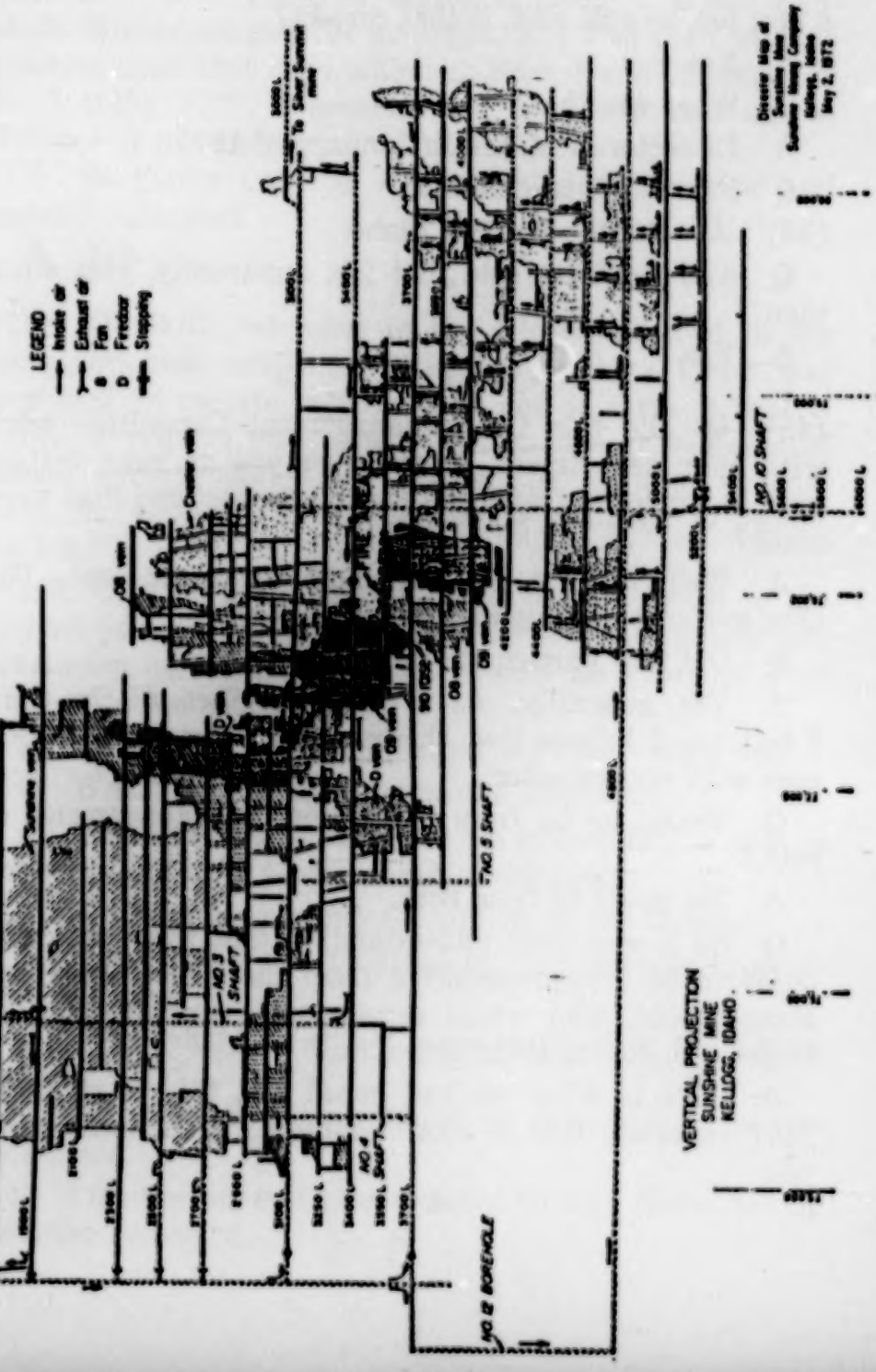
DISASTER MAP OF SUNSHINE MINE

May 2, 1972



ORAL DEPOSITION OF CARL GRINER
TAKEN OCTOBER 16 AND 18, 1973

[17] Q All right, now, apparently in 1970 you took a new job, or new post, is that correct?

A Yes.

Q What was that?

A Inspector of Mines, in January of 1971.

Q For the State of Idaho?

[18] A For the State of Idaho.

Q And you have held that job, apparently, ever since then?

A Yes.

• • • •

[45] Q Did this Union-Management Committee work with your department, either with you or your inspectors, in connection with the various inspections that were made?

A Well, I'm not just sure how you mean that. Did they cooperate, is this what your asking?

Q Did they participate in the inspections?

A Yes, generally. As a matter of fact all the time, I believe. I believe that there was a Safety Committeeman with my inspector.

Q Would he be from the Union or Management, or both?

A He would be from both.

Q So it was your understanding that there was supposed to be a representative from the Union and from Management, who would accompany your inspector, or inspectors, during their inspection?

A This is what we had hoped for, this is what we [46] expected, this is what we requested in most cases, yes.

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ORAL DEPOSITION OF MARVIN C. CHASE
TAKEN OCTOBER 16, 1973

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[5] A • • • Then, in March of 1969, I joined Sunshine Mining as general manager, and I've been in that position since that time, although since Mr. McManus left in, I think 1970, I became vice president, and also a director of the company.

Q So you're curently a vice president, director and general manager?

A Yes.

• • • •

[73] Q With reference to the allegations filed in the complaint, they have alleged the Steelworkers' Union was negligent in certain regards, and one of them is that it failed to require mine evacuation on fire or evidence of smoke underground. Now this matter of mine evacuation, Mr. Chase, is a matter for the company to decide, isn't it?

MR. CARTWRIGHT: I'll object to that, again on the ground you're once again calling for a legal opinion and conclusion on the part of this witness as to whose duty and obligation this was.

MR. FULLER: Ask him what his observation was.

Q Would you please answer the questions.

A The company would order an evacuation; a man is not obliged to work under unsafe conditions.

Q We're talking about evacuation at the time—

A The order would be given by management to evacuate the mine.

Q You would not expect some member of the Union to order that?

[74] A No, I would not expect it; or to stay in an unsafe place.

Q I'm sure none of them wanted to stay there, not by pleasure or choice.

Q Now, in reference to the matter of fire drills, that is a matter that would be conducted by the company, would it not?

MR. CARTWRIGHT: I'm going to object to that unless the purport of your question is whether or not the drills themselves would be conducted by the company, as distinguished from the Union.

Q Will you answer the question, please.

A The company would conduct fire drills, if such were to be conducted.

Q These fire drills would be conducted within the mine itself? Wouldn't they have to be there?

A Yes.

Q Rather than outside on the surface?

A Yes.

Q In reference to requiring personnel to—personal protective equipment, that again is something that the company would be ordering and directing to be used, would it not, Mr. Chase?

A Are you speaking of self rescuers?

Q Yes.

[75] A The company had ordered and placed them there for the use of the men.

Q And the company furnished that type of safety device, didn't it?

A Yes, we did.

Q And again you would not expect the Union itself to be furnishing that type of device would you?

A I would not.

Q And would you—would the company be maintaining that type of epuipment?

A We did maintain it.

Q And again you would not expect any of the individual workmen to be maintaining it, would you, sir?

A Except that he should report any unsafe conditions.

Q But other than that he wouldn't be required to maintain it or see that it was in good condition?

A I wouldn't expect him to.

Q Would the Union—strike that. Would the company have control of and handle all matters relative to the disposition of used timbers used underground?

A Yes, they would.

Q And where they put them, and what they did with them would be under your control and supervision, would it not?

A Yes, sir.

[76] Q As far as the Union itself is concerned, you would not expect it, the Union, to take part in the disposition or handling of those timbers?

A Just to follow orders.

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ORAL DEPOSITION OF MERLIN HOFFMAN TAKEN OCTOBER 17, 1973

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[8] Q When you were hired by Sunshine in 1968 you were hired as a safety engineer at that time?

A Yes, sir.

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[90] Q Mr. Hoffman, are you aware—do you know of any affirmative thing that any members of the union did that was the cause of, or affected the fire, or the ultimate death of these men?

A You're asking if I know of anybody that would deliberately do somethign to create this catastrophe?

Q Do you know of any affirmative act done by any union member that related to this accident?

A I know of nothing.

Q Do you know of anything the union, or its representatives and members, failed to do that, in your opinion, caused or contributed to the cause of this fire and the ultimate deaths? The first time I asked you if you

knew anything that they had done; now do you know anything they failed to do?

A No, sir, I can't recall of any.

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[92] Q In the union contract it appears that, "Two men shall be designated by the union to accompany the safety engineer on tours of the mine. Once each month, one of these two men, together with the safety engineer, shall make a tour of a section of the mine." Was this done?

A Yes, sir.

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ORAL DEPOSITION OF LAWRENCE L. MARSHALL TAKEN OCTOBER 17, 1973

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[4] Q Your business or occupation?

A Staff Representative, United Steelworkers of America.

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[25] Q Other than for whatever inspections that the members of this committee made with reference to the safety conditions in the Sunshine Mine, up until the date of the fire, did the International do anything else with reference to the safety conditions in that mine that you know of?

A I don't understand.

Q Did it conduct any independent investigation or surveys or bring in any outside or International employees to make any investigations concerning the safety conditions in [26] that mine up until the date of the fire?

A Not to my knowledge.

MR. COHEN: I'm going to object in the sense that there is no establishment that there was any right of any party other than the existing safety committee consisting of members of the union to participate in such activity.

Q Insofar as you know, the only representatives of the union, International or local, who participated in any

of the safety considerations at the Sunshine Mine, would be the members of the committee?

A Yes.

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ORAL DEPOSITION OF LAVERN ALBERT MELTON TAKEN OCTOBER 17, 1973

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[3] Q Your business or occupation?

[4] A Miner.

Q What is your connection with mining?

A Shaft repairman, I work for Sunshine Mining Company.

Q How long have you worked as the shaft repairman?

A Four years.

Q For Sunshine?

A Four years.

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[9] Q And at some point you became not only a member of the union, but also an officer of the union?

A Yes, I did.

Q When was that?

A I don't know, when Art Udstad retired, I guess prior to that, I guess when Dick Crane passed away, I became Financial Secretary.

Q About what year?

A Oh, let's see, '69, maybe.

Q Then you continued as Financial Secretary up until about when?

A Until 1970.

Q At which time you were elected President?

A Right.

Q And you have been President ever since?

A Yes.

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[19] Q Now the contract provides that these—well, the men designated by the union are to accompany the

safety engineer on tours of the mine, and once each month, one of these men to go with the safety engineer shall make a tour of a section of the mine, and results of this tour shall be considered at the following union-management safety committee meeting. Was that [20] provision of the contract carried out?

A Yes.

Q Was there an union-management safety committee meeting once each month?

A Yes.

Q There are minutes of each of those meetings?

A Yes.

Q It also provides that an union member may accompany the State Mine Inspector, or his deputy, on any inspection of the property. Was that done?

A Yes.

• • • •

[25] Q What standards, if any, did you follow or utilize in determining whether a man should be appointed to the safety committee or continued on the safety committee?

A The standard I looked for with a person was that if I felt he would be a conscientious person that would do the job that we had hoped they could do, who was familiar with the mine; I chose Gordon Whatcott, he was a gypo miner, and he had shown interest in the union; I chose Mr. Boehner because he was a day's pay miner, and he was interested in the employees.

Q You say you chose Mr. Bechner and Mr. Whatcott—

A Not for the fact they could read or write, but that they could do a job.

Q What job did you expect them to do?

A Take and represent the employees for bitches about [26] safety.

Q Just bitches about saefety, or also to make investigations to determine what conditions in the mine might be unsafe or dangerous?

A No, I did not expect them to do this, I did not have this ability, and I didn't expect them to have the ability. This is one of the reasons I did not care if they could read or write; they had practical knowledge, and that's the most important thing.

Q At any time up until the date of the fire, carrying out your work of your committee, did you retain or hire any independent safety consultants or experts of any kind to make safety investigations with you?

A What do you mean?

MR. COHEN: I'm going to object to that question on the ground that there is no foundation that the union would have any right to have any of those people under this agreement.

Q That may be, I'm asking if they did retain anybody to make any such investigation, it's a simple question.

A No.

MR. COHEN: If they can't be there, how can they make that investigation? If you want to, ask him whether or not we hired, retained anybody as a consultant to the local union, I have no objection.

Q Did you retain anybody as a safety consultant for the [27] local union to investigate or make any determination of any kind or nature with reference to the safety conditions at the Sunshine Mine before the fire occurred?

A No, I never.

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[29] Q I'll rephrase the question, and try to make it a little clearer; were there any improvements, safety improvements, which you or your committee suggested to the Sunshine Mine that were not adopted or carried out by the Sunshine Mine?

A By myself or the safety committee, yes there were.

Q What was that?

A Well, the solitary employment situation; this has been a problem for quite some time.

[30] Q That has to do with requiring a man to work by himself and not in the company of another worker, is that correct?

A Yes.

Q What else, if anything?

A Secondary escapeways.

Q Did you feel—

A Your question was that the company did not comply with?

Q Yes, that would be the second category.

A They finally complied with the secondary escapeways.

Q After the fire?

A No, prior to the fire. Another recommendation that I made that I do not have a documented evidence of, was I asked for evacuation of the mine in case of fire, and which was brought out by a fire that happened, I don't know, just about a year prior to this fire, and the company did not think it was necessary.

• • • •

[32] Q Did you mention this also to the State inspector?

A Yes, I discussed this with Bill Spear.

Q Do you know whether or not he ever took any steps—

A I informed him that there was a fire, he did not know [33] it until that time that there was a fire.

Q Do you know if the stench system was working at the time of that fire that occurred?

A I know it was not working.

Q Do you know whether or not it was ever repaired, that it wasn't working up until the time of the disaster on May 2?

A I was aware it was not working through the efforts of the State inspector. He informed me that it wasn't hooked up, and he said the company promised

they would hook it up immediately, and they claim it was hooked up.

• • • •

[44] Q What expertise, if any, did you have in the field of underground mine safety procedure and conditions, up until the time of this fire?

A The expertise I had is what a general miner has; the school of hard knocks.

Q Other than that, you did not have any particular expertise, is that correct?

A No, if I did I wouldn't be underground.

Q Did you get the impression that until the time of the [45] fire, that the Sunshine Mining Company's management was more interested in production than they were in the safety of the workers in the mine?

A Yes.

MR. KADING: I'd like to have the record show that I have objected to the form of that question.

Q Would you set forth some of the various circumstances and factors which caused you to form that opinion?

A Well, when I made the complaint about not evacuating the mine, the one day of the fire, prior to the tragedy, the company said it would be silly to take and shut down production and pull all of the men out of the mine, and find out it was just a burning rag, and they could not afford to do this, and put them back to work.

Q That was about a year before the fire occurred?

A Something like that.

Q Does that ring a bell in your head, that perhaps the Sunshine Mine management was not all that interested in the safety of your union people, and perhaps you had better bring in some experts or anything of that nature to see what should be done to insure safety in that mine?

MR. KADING: I'll object to the form of the question.

MR. COHEN: I'll object to the question, and the question of what legal rights the union would have.

Q When you realized, one year before this disaster occur- [46] red, that management was more interested in production than it was in safety, what, if any, steps or things did you do thereafter to try to see that the mine was safe for your union members?

A I consulted the Federal inspectors and State inspectors.

Q Mr. Griner?

A I talked to Mr. Griner, I talked to Mr. Spear, I talked to—I can't think of the other man's name.

Q What did you talk to them specifically about?

A I consulted both of them about the secondary escapeways.

Q Did you tell them you felt they were unsafe?

A I didn't understand what it required, the secondary escapeway—

Q When did you tell Mr. Spear and Mr. Griner about this?

A Just prior to this letter I wrote on the secondary escapeways.

Q Do you know whether or not they ever did anything about it?

A No, I don't; they did inspect it.

Q Did they ever report back to you as to what they found?

A They reported to me that the law was so loose that the company technically was in compliance.

Q Did they tell you that the secondary escape routes [47] would not be adequate in the event of a fire?

A They said they would be adequate under the language that they had to work with.

Q Did they tell you whether or not they'd be adequate in practice as distinguished from the language of the regulations?

A They did not specifically say this.

Q Did you ask?

A Yes, I believe I did.

Q What did they say?

A All they could do was work within the law.

• • • •

[61] Q All right, on these monthly inspections, trips that would be made by the safety committee, some of which you were not on, did the Sunshine Mine people place any restrictions on what you could inspect or what you could do, to try to see, as to whether or not there were unsafe procedures or conditions?

A They did not place any restrictions, but they had the inspection route laid out and by the time you had completed the areas they had lined out, there was no more time to inspect anything else, but I would assume—I can't assume, so okay.

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF SHOSHONE

[Title Omitted]

FIRST INTERROGATORIES TO DEFENDANT, UNITED STEELWORKERS OF AMERICA

INTERROGATORY NO. 11: Please state the name, address, and job title or capacity of the members of the Local Union #5089 Safety Committee of the Sunshine Mining Company at Kellogg, Idaho.

ANSWER: Gordon Whatcott (deceased)
844 South Division
Kellogg, Idaho 83837

Einar Pedersen
Star Route
Kellogg, Idaho 83837

Don Beehner, Chairman (deceased)
Box 1262
Wallace, Idaho 83873

Kenneth Chambers (address unknown)

INTERROGATORY NO. 12: Please state the names of those members of the Safety Committee who are members of the United Steelworkers of America.

ANSWER: Gordon Whatcott (deceased)
Einar Pedersen
Don Beehner (deceased)
Kenneth Chambers

INTERROGATORY NO. 13: Please state specifically, the purpose of the Safety Committee referred to in the preceding two Interrogatories.

ANSWER: See Article IX, Section 3 of the collective bargaining agreement.

INTERROGATORY NO. 14: Please list all duties and responsibilities of the said Safety Committee.

ANSWER: The duties and responsibilities of the Safety Committee are set forth in detail in Article IX, Section 3 of the collective bargaining agreement. They are designed to assist the company in carrying out its "responsibility to provide for the safety and health of its employees during the hours of their employment. . . ." See also Article IX, Section 1 and Article XVI, Section 3 of the collective bargaining agreement.

• • • •

INTERROGATORY NO. 22: Please state whether or not it was a duty or responsibility of said Staff Representative to participate in any of the State or Federal safety inspections, at the Sunshine Mine at Kellogg, Idaho.

ANSWER: No. Under Article IX, Section 4 of the collective bargaining agreement, non-employees, such as a Staff Representative had no right to participate in underground inspections by the Government.

• • • •

INTERROGATORY NO. 28: Please state whether or not the Staff Representative of United Steelworkers of America at Kellogg, Idaho, made any personal tours or inspections of the Sunshine Mine at Kellogg, Idaho, and if so, the dates of such tours or inspections, and the reasons for the same.

ANSWER: No. See also answer to Interrogatory No. 22. Staff Representative has no right to engage in such activity.

• • • •

INTERROGATORY NO. 39: Please state whether or not the United Steelworkers of America employed the services of any expert dealing with mine safety, in an advisory or other capacity. If your answer is in the affirmative, please state, for both prior to May 2, 1972, and subsequent to May 2, 1972, the following:

(a) The name, address and telephone number of such experts;

(b) The dates of said employment;

(c) The subject matter of such expert's expertise.

ANSWER: No.

INTERROGATORY NO. 40: Please state whether or not the United Steelworkers of America conducted any independent investigations or surveys, or brought in any outside employee to make any investigations concerning the safety conditions in the Sunshine Mine at Kellogg, Idaho, and if so, please state:

(a) The name, address, job capacity or title of such person or persons.

(b) The dates of said investigations or surveys.

(c) The reasons for such investigations or surveys.

(d) Whether or not any written reports were made of such investigations, and if so, the name and address of the person who has present possession of said reports.

ANSWER: No. The United Steelworkers of America had no authority to bring in outside persons to investi-

gate and inspect the properties owned by the Sunshine Mining Company.

• • • •

INTERROGATORY NO. 44: Please state whether or not members of the Safety Committee of the Sunshine Mine at Kellogg, Idaho, were:

(a) required, or allowed, to accompany State or Federal Mine Inspectors in their regular inspections of the Sunshine Mine, and the reasons therefore;

(b) included in any and all regular inspections, or inspections made on an irregular basis, because they demanded to be included.

ANSWER:

(a) One Union member of the Safety Committee was allowed to accompany state mine inspectors in their regular inspection of the Sunshine Mine under the provisions of the collective bargaining agreement (Article IX, Section 4). The Company refused to permit Union members of the Safety Committee to accompany federal mine inspectors during the latter's entire inspection tours.

(b) No. The Safety Committee had no contractual right to be included in any inspections conducted by the Company other than the joint tour provided for in Article IX, Section 5 of the collective bargaining agreement.

INTERROGATORY NO. 45: With regard to safety recommendations related to safety conditions made by the Safety Committee, please state what action is taken by the United Steelworkers of America if such recommendations are not carried out.

ANSWER: See Article IX, Sections 3 and 6 and Article XVI, Section 3 of the collective bargaining agreement.

• • • •

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF SHOSHONE

[Title Omitted]

AFFIDAVIT OF EINAR PEDERSEN

STATE OF IDAHO)
) ss.
COUNTY OF SHOSHONE)

EINAR PEDERSEN, being first duly sworn upon oath, deposes and says:

1. I was employed by the Sunshine Mining Company at its silver mine in Kellogg, Idaho, from 1949 until my retirement in 1973. I was classified as a timber repairman.

2. Commencing in 1954 and continuing to this date, the United Steelworkers of America, AFL-CIO, and its chartered Local 5089 (jointly referred to as the "Union"), was the exclusive representative of a bargaining unit consisting of all the Company's production and maintenance employees, including myself. I became a member of the Steelworkers in approximately 1960.

3. During this same period of time, Sunshine Mining Company and the Union entered into a series of successive collective bargaining agreements covering the terms and conditions of employment for the production and maintenance employees.

4. Article XVI, section 3, of the March 11, 1970 Agreement (which was in effect when the underground fire occurred in May, 1972) provided that:

> "3. The management of the Company's property being vested exclusively in the Company, the Company has, subject to the provisions of this Agreement, the sole discretion of the working forces, including among others the right to hire, discipline and discharge for cause, to assign work, to determine qualifications, to effect job changes, to determine the equipment to be used and to expand, curtail, suspend, or resume operations."

That same basic provision, to the best of my knowledge, was contained in each of the contracts negotiated between Sunshine and the Union.

5. Article IX of the contract sets forth the commitments which the Company agreed to undertake with reference to its responsibility to provide for the safety and health of its employees. Article IX also contains a description of the limited role in the safety and health area which Local 5089 was authorized to play on behalf of the employees in the bargaining unit.

6. I was elected a member of the Local Union Safety Committee in 1961. Thereafter and continuing until 1973, I served in that capacity upon being appointed by the respective Local Union Presidents.

7. Throughout the entire course of my tenure as a Safety Committeeman, the services I performed on behalf of bargaining unit employees were a direct result of Article IX of the contract. Further, the Safety Committee acted only in an advisory capacity in accordance with the express provisions of Article IX. (A copy of that Article is attached hereto as Exhibit A to the Pedersen Affidavit.)

Further your affiant sayeth not.

DATED this 12th day of August, 1975.

/s/ Einar Pedersen
EINAR PEDERSEN

[Jurat Omitted]

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR SHOSHONE COUNTY

[Title Omitted]

AFFIDAVIT OF LAWRENCE L. MARSHALL

STATE OF IDAHO)
) ss.
COUNTY OF SHOSHONE)

I, LAWRENCE L. MARSHALL, being first duly sworn on oath, depose and say that;

1. I am a staff representative of the United Steelworkers of America (AFL-CIO) and that I have held such position since March 11, 1968.

2. The United Steelworkers of America, AFL-CIO, and its local Union 5089 were jointly certified as the exclusive bargaining representative of the production and maintenance employees of the Sunshine Mining Company in 7-29-54.

3. I was assigned to service local Union 5089 at this Sunshine Mining Company from March 11, 1968 to October 1, 1973.

4. The duties of a staff representative includes negotiating collective bargaining agreements on behalf of local unions chartered by the United Steelworkers of America, AFL-CIO.

5. I was chief spokesman for the union negotiating committee which negotiated the March 11, 1970, collec-

tive bargaining agreements between the Sunshine Mining Company and the United Steelworkers of America, AFL-CIO (a copy of which is attached hereto as Exhibit "A"); that said contract was in effect on May 2, 1972.

6. Article 9 of said collective bargaining agreement provides for the establishment of a safety committee at the Sunshine Mining Company.

7. Article 9 of the collective bargaining agreement sets forth the functions of the safety committee at the Sunshine Mining Company.

Further your affiant sayeth not.

DATED this 12th day of August, 1975.

/s/ Lawrence L. Marshall
LAWRENCE L. MARSHALL

[Jurat Omitted]

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF SHOSHONE

[Title Omitted]

AMENDED COMPLAINT, DEMAND FOR JURY TRIAL AND MOTION FOR MAINTENANCE OF CLASS ACTION

COME NOW the above named Plaintiffs and additional Plaintiffs and as and for their causes of action against the above named Defendant, complain and allege as follows:

COUNT ONE

I.

The individually named Plaintiffs are heirs at law of Glen Raymond Rossiter, Don B. Wood, Wayne Lyle Johnson, and John R. Rawson, miners employed at the Sunshine Mine in Shoshone County, Idaho, who died on May 2, 1972, as a direct and proximate result of the negligence of the Defendant.

II.

Laura Dunbar has been appointed in Civil Case No. 17942 as Guardian ad Litem for Rickina Rossiter and Glen Raymond Rossiter, Jr., her minor children, heirs at law of Glen Raymond Rossiter. Rickina Rossiter and Glen Raymond Rossiter, Jr., are the heirs at law of Glen Raymond Rossiter, deceased. Also Laura Dunbar, for and on behalf of all persons similarly situated and designated herein as John Does and Jane Does #1 through #400.

III.

Mary Wood has been named Guardian ad Litem for Leslie D. Wood, her minor child, heir at law of Don B. Wood, in Civil Case No. 18222. Leslie D. Wood is the heir at law of Don B. Wood.

IV.

Berniece Johnson is the widow of Wayne Lyle Johnson, deceased. She has been appointed Guardian ad Litem for Michael Wayne Johnson, Ruth Ellen Johnson, and John Russell Johnson, minor children of her and of Wayne Lyle Johnson in Civil Case No. 17741. Berniece Johnson, Michael Wayne Johnson, Ruth Ellen Johnson, John Russell Johnson, Christine Johnson, and Donald Johnson are the heirs at law of Wayne Lyle Johnson, deceased.

V.

Tharon Rawson is the widow of John R. Rawson, deceased. She has been named as Guardian ad Litem for Seth Rawson and Cindy Rawson, heirs at law of John R. Rawson, deceased, in Civil Case No. 17694. Tharon Rawson, Seth Rawson and Cindy Rawson are the heirs at law of John R. Rawson, deceased.

VI.

That the legal representatives of the estates of the above named plaintiffs' decedents, individually and on behalf of all decedent miners' estates similarly situated, are designated herein as John Doe and Jane Does #401 through #491, to be named at a later date when all of those who are similarly situated have been identified.

VII.

Ninety-one miners, employees of the Sunshine Mine in Shoshone County, Idaho, were killed on May 2, 1972, in a fire at the said mine. There are numerous heirs at law

of those deceased miners, who are entitled to recovery against the Defendant by reason of the deaths of the said miners, which deaths were the direct and proximate result of the negligence of the Defendant.

VIII.

It is appropriate that the individually named Plaintiffs be permitted to sue as representative parties on behalf of all of the heirs at law of miners killed in the Sunshine Mine fire of May 2, 1972. It is appropriate that a class action be maintained for the following reasons:

A. The class consisting of the heirs at law of the deceased miners is so numerous that the joinder of all members of the class is impracticable;

B. There are questions of law and fact common to the class of claimants;

C. The claims of the representative parties are typical of the claims of the class of claimants sought to be represented; and

D. The individual Plaintiffs will fairly and adequately protect the interests of the class.

IX.

Class action should be permitted to be maintained in this matter in that:

A. The continued prosecution of the separate actions brought by the individual Plaintiffs would create a risk of adjudications with respect to the individual members of the class of claimants which would as a practical matter be dispositive of the interests of the other members of the class of parties to the adjudications; and

B. There are questions of law and fact common to the members of the class which predominate over

any questions affecting only individual members of a class; and

C. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

X.

It is unlikely, given the circumstances of representation of certain of the heirs at law of the deceased miners, other than the individually named Plaintiffs herein, in previous litigation in the courts of the United States of America, that the heirs at law of the deceased miners, other than the individually named Plaintiffs, will receive relief against the Defendant unless the individually named Plaintiffs are permitted to pursue this action on behalf of themselves and representative of other heirs at law of the deceased miners similarly situated.

XI.

The individually named Plaintiffs have filed actions in this Court which actions are in nowise intended to be affected by the filing of this Complaint and Motion, but it will be appropriate, if the Motion for creation and maintenance of a class action as here incorporated is granted, to consolidate those actions with this action for trial.

XII.

The Defendant is a labor union, an unincorporated association, and is and was, on May 2, 1972, doing business in the State of Idaho.

XIII.

The Defendant owed the Plaintiffs' decedents the duty of due care under Idaho law.

XIV.

The Defendant undertook to act as accident prevention representative and enforcer of an agreement negotiated

between the said Defendant on behalf of the deceased miners and so acted negligently in at least the following respects:

A. It misrepresented its safety concern and expertise to the rank and file.

B. It failed to develop adequate safety programs for its union membership.

C. It undertook to provide representatives who inspected and pretended to enforce the contractual accident prevention clauses, and did so negligently, to-wit:

(1) It failed to require mine evacuation on first evidence of smoke underground;

(2) It failed to require fire drills;

(3) It failed to require personal protective equipment;

(4) It failed to require adequate protection against spontaneous combustion of discarded timbers underground;

(5) It failed to require adequate emergency egress from the mine.

XV.

Each of the aforesaid acts of negligence was jointly and severally a proximate cause of Plaintiffs' decedents' untimely deaths.

XVI.

Prior to their deaths, the miners now deceased were in good health and capable of earning substantial sums, and did provide support, services, advice, nurture, companionship and consortium to their families.

XVII.

The individually named Plaintiffs and all heirs at law of the deceased miners similarly situated have been

deprived of the support, services, advice, nurture, companionship and consortium of the deceased miners.

XVIII.

That prior to their deaths, the miners now deceased were in good health and that because of the nature of the fire and its location, they were caused to unduly suffer conscious painful deaths by suffocation, all to their general damages and the general damages to their estates in a sum to be proven at time of trial.

XIX.

Plaintiffs demand a trial by Jury.

COUNT TWO

I.

The additional Plaintiffs, KENNETH A. RILEY and MYRLE RILEY, husband and wife, are residents of Shoshone County, Idaho. That KENNETH RILEY was a miner employed at the Sunshine Mine in Shoshone County, Idaho, and working in the said mine on May 2, 1972.

II.

That the additional plaintiffs, injured survivors, individually and on behalf of all injured survivors similarly situated, are designated herein as John Doe and Jane Does #500 through #550, to be named at a later date when all of those who are similarly situated have been identified.

III.

That as a result of the fire in the said mine on May 2, 1972, ninety-one (91) miners, employees of the Sunshine Mine, were killed, and in addition to the deaths, KENNETH RILEY was severely and permanently injured as a direct and proximate result of the negligence of the Defendant.

IV.

That as a direct and proximate result of the Defendant's negligence, KENNETH RILEY has incurred substantial medical expenses in the past and will continue to incur medical expenses in the future. In addition to the above, KENNETH RILEY, has suffered a loss of income in the past and will continue to suffer a loss of income in the future. Additionally, KENNETH RILEY, has been generally damaged by pain and suffering, loss of consortium and loss of enjoyment of life. All of the said damages in the sums which will be proven at time of trial.

V.

That as a direct and proximate result of the Defendant's negligence, MYRLE RILEY, has incurred substantial medical expenses relating to her husband's injuries and need for constant care. In addition, she has suffered a loss of her community interest in the past and future earnings of her husband. Additionally, she has been generally damaged for her pain, suffering and distress as a result of her husband's injuries manifest in his diminished ability to cope and adjust to his injuries; in her loss of consortium, companionship, society and enjoyment of life. All of the above specified damages in the sums which will be proven at time of trial.

VI.

In addition to the injuries sustained by KENNETH RILEY as a survivor, other persons who survived and were injured are similarly situated and have causes of action against the Defendant herein. (John Does and Jane Does #500 through #550).

VII.

It is appropriate that these individuals named as additional plaintiffs be permitted to sue as representative

parties on behalf of all other of the survivors who were injured in the Sunshine Mine fire of May 2, 1972. It is appropriate that a class action be maintained for the following reasons:

A. The class consisting of injured survivors is so numerous that the joinder of all members of the class is impracticable;

B. There are questions of law and fact common to the class of claimants;

C. The claims of the representative injured parties are typical of the claims of the class of claimants sought to be represented; and

D. The individual Plaintiffs will fairly and adequately protect the interests of the class.

VIII.

Class action should be permitted to be maintained in this matter in that:

A. The continued prosecution of the separate actions brought by the additional Plaintiffs would create a risk of adjudications with respect to the individual members of the class of claimants which would as a practical matter be dispositive of the interests of the other members of the class of parties to the adjudications; and

B. There are questions of law and fact common to the members of the class which predominate over any questions affecting only individual members of a class; and

C. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

IX.

It is unlikely, given the circumstances of representation of injured survivors, other than the individually named additional plaintiffs herein, in previous litigation in the courts of the United States of America, that the injured survivors, other than the individually named additional plaintiffs, will receive relief against the Defendant unless the individually named additional plaintiffs are permitted to pursue this action on behalf of themselves and representative of other injured survivors similarly situated.

X.

The Defendant is a labor union, an unincorporated association, and is and was, on May 2, 1972, doing business in the State of Idaho.

XI.

The Defendant owed these additional plaintiffs the duty of due care under Idaho law.

XII.

The Defendant undertook to act as accident prevention representative and enforcer of an agreement negotiated between the said Defendant on behalf of the deceased miners and so acted negligently in at least the following respects:

A. It misrepresented its safety concern and expertise to the rank and file.

B. It failed to develop adequate safety programs for its union membership.

C. It undertook to provide representatives who inspected and pretended to enforce the contractual accident prevention clauses, and did so negligently, to-wit:

(1) It failed to require mine evacuation on first evidence of smoke underground;

(2) It failed to require fire drills;

(3) It failed to require personal protective equipment;

(4) It failed to require adequate protection against spontaneous combustion of discarded timbers underground;

(5) It failed to require adequate emergency egress from the mine.

XIII.

Each of the aforesaid acts of negligence was jointly and severally a proximate cause of these additional plaintiffs' injuries and damages.

XIV.

That prior to his injuries, KENNETH RILEY, was in good health and capable of earning substantial sums, and did provide support, services, advice, nurture, companionship and consortium to his family.

XV.

That all injured survivors similarly situated did provide support, services, advice, nurture, companionship and consortium to their families.

XVI.

Additional Plaintiffs demand a trial by jury.

COUNT THREE

I.

Plaintiffs hereby reiterate paragraphs I through XIX of their Count One, and incorporate the same herein by reference thereto as though set forth in full verbatim.

II.

That the acts of the Defendant as specifically set forth in paragraph XIV of Count One were willful, wanton, reckless and grossly negligent.

III.

That the hereinabove set forth acts on the part of the Defendant were such that they support the award of punitive damages to all individually named plaintiffs and to those included within the class.

IV.

That the acts hereinabove set forth acts on the part of the Defendant are such as to support the award of attorney's fees incurred on behalf of all individually named plaintiffs and members of the class in the prosecution of these actions.

COUNT FOUR

I.

Additional Plaintiffs hereby reiterate paragraphs I through XVI of their Count Two, and incorporate the same herein by reference thereto as though set forth in full verbatim.

II.

That the acts of the Defendant as specifically set forth in paragraph XII of Count Two, were willful, wanton, reckless and grossly negligent.

III.

That the hereinabove set forth acts on the part of the Defendant were such that they support the award of punitive damages to all additional plaintiffs and to those included within the class.

IV.

That the acts hereinabove set forth acts on the part of the Defendant are such as to support the award of attorney's fees incurred on behalf of all additional plaintiffs and members of the class in the prosecution of these actions.

COUNT FIVE

I.

Plaintiffs hereby reiterate paragraphs I through XII of their Count One, and incorporate the same herein by reference thereto as though set forth in full verbatim.

II.

That the Defendant made the following representations to its members, the rank and file of said Union:

A. That it was a competent organization for protecting the welfare, safety and interest of its members, and had a concern for said welfare, safety and interest of its members.

B. That it has a reliable degree of expertise in underground mining.

C. That it would develop adequate programs of safety through its union representatives for the benefit of its members, the rank and file of said union.

D. That it would provide competent union representatives to participate in the inspections of the mine for safety and accident prevention.

E. That it would enforce the provisions of the union contract with the Sunshine Mine as the same regarded safety and accident prevention.

III.

That contrary to its representations, the Defendant specifically failed to do the following:

(1) It failed to require mine evacuation on first evidence of smoke undergrounds;

(2) It failed to require fire drills;

(3) It failed to require personal protective equipment;

(4) It failed to require adequate protection against spontaneous combustion of discarded timbers underground;

(5) It failed to require adequate emergency egress from the mine.

(6) It failed to initiate and instigate the formation of any safety programs.

IV.

That all representations made by the Defendant as enumerated in paragraph II above were false and were material to the actions of the plaintiffs' decedents and all of the rank and file members of the defendant, who relied upon the same.

V.

That the Defendant intended that its representations should be acted upon by the plaintiffs' decedents and were so acted upon by the plaintiffs' decedents in a reasonably contemplated manner; that the plaintiffs' decedents were ignorant of the falsity of defendant's representations; that the plaintiffs' decedents reasonably relied upon the alleged truthfulness of said representations; and that the plaintiffs' decedents had a right to rely upon the said representations.

VI.

That each of the aforesaid misrepresentations was jointly and severally a proximate cause of plaintiffs' decedents' untimely deaths.

VII.

Prior to their deaths, the miners now deceased were in good health and capable of earning substantial sums, and did provide support, services, advice, nurture, companionship and consortium to their families.

VIII.

The individually named Plaintiffs and all heirs at law of the deceased miners similarly situated have been deprived of the support, services, advice, nurture, companionship and consortium of the deceased miners.

IX.

That prior to their deaths, the miners now deceased were in good health and that because of the nature of the fire and its location, they were caused to unduly suffer conscious painful deaths by suffocation, all to their general damages and the general damages to their estates in a sum to be proven at time of trial.

X.

That the aforementioned acts on the part of the Defendant are alleged constructive fraud against these individual plaintiffs and all others similarly situated.

COUNT SIX

I.

Additional Plaintiffs hereby reiterate paragraphs I through X of their Count Two, and incorporate the same herein by reference thereto as though set forth in full verbatim.

II.

That the Defendant made the following representations to its members, the rank and file of said Union:

A. That it was a competent organization for protecting the welfare, safety and interest of its members, and had a concern for said welfare, safety and interest of its members.

B. That it has a reliable degree of expertise in the safety and welfare field as the same relates to underground mining.

C. That it would develop adequate programs of safety through its union representatives for the benefit of its members, the rank and file of said union.

D. That it would provide competent union representatives to participate in the inspections of the mine for safety and accident prevention.

E. That it would enforce the provisions of the union contract with the Sunshine Mine as the same regarded safety and accident prevention.

III.

That contrary to its representations, the Defendant specifically failed to do the following:

(1) It failed to require mine evacuation on first evidence of smoke underground;

(2) It failed to require fire drills;

(3) It failed to require personal protective equipment;

(4) It failed to require adequate protection against spontaneous combustion of discarded timbers underground;

(5) It failed to require adequate emergency egress from the mine;

(6) It failed to initiate and instigate the formation of any safety programs.

IV.

That all representations made by the Defendant as enumerated in paragraph II above were false and were material to the actions of the injured survivors and all of the rank and file members of the defendant, who relied upon the same.

V.

That the Defendant intended that its representations should be acted upon by the injured survivors and were so acted upon by the injured survivors in a reasonably contemplated manner; that the injured survivors were ignorant of the falsity of defendant's representations; that the injured survivors reasonably relied upon the alleged truthfulness of said representations; and that the injured survivors had a right to rely upon the said representations.

VI.

That each of the aforesaid misrepresentations was jointly and severally a proximate cause of the injuries to the survivors.

VII.

Prior to their injuries, the survivors and all other injured survivors similarly situated were in good health and capable of earning substantial sums, and did provide support, services, advice, nurture, companionship and consortium to their families.

VIII.

That the aforementioned acts on the part of the Defendant are alleged constructive fraud against these additional plaintiffs and all others similarly situated.

COUNT SEVEN

I.

Plaintiffs hereby reiterate paragraphs I through XII of their Count One, and incorporate the same herein by reference thereto as though set forth in full verbatim.

II.

That the Defendant made the following representations to its members, the rank and file of said Union:

A. That it was a competent organization for protecting the welfare, safety and interest of its members, and had a concern for said welfare, safety and interest of its members.

B. That it has a reliable degree of expertise in the safety and welfare field as the same relates to underground mining.

C. That it would develop adequate programs of safety through its union representatives for the benefit of its members, the rank and file of said union.

D. That it would provide competent union representatives to participate in the inspections of the mine for safety and accident prevention.

E. That it would enforce the provisions of the union contract with the Sunshine Mine as the same regarded safety and accident prevention.

III.

That contrary to its representations, the Defendant specifically failed to do the following:

(1) It failed to require mine evacuation on first evidence of smoke underground;

(2) It failed to require fire drills;

(3) It failed to require personal protection equipment;

(4) It failed to require adequate protection against spontaneous combustion of discarded timbers underground;

(5) It failed to require adequate emergency egress from the mine;

(6) It failed to initiate and instigate the formation of any safety programs.

IV.

That all representations made by the Defendant as enumerated in paragraph II above were false and were material to the actions of the plaintiffs' decedents and all of the rank and file members of the defendant, who relied upon the same.

V.

That the Defendant knew that the aforementioned representations were false, or were recklessly indifferent as to whether or not said representations were true and would be acted upon.

VI.

That the Defendant intended that its representations should be acted upon by the plaintiffs' decedents and were so acted upon by the plaintiffs' decedents in a reasonably contemplated manner; that the plaintiffs' decedents were ignorant of the falsity of defendant's representations; that the plaintiffs' decedents reasonably relied upon the alleged truthfulness of said representations; and that the plaintiffs' decedents had a right to rely upon the said representations.

VII.

That said representations were made willfully, maliciously and intentionally and with an intent to deceive the plaintiffs' decedents, and thus constitute actual fraud, thereby supporting an award of punitive damages to all individually named plaintiffs and to those included within the class.

VIII.

That the acts of the Defendant hereinabove set forth are such as to support an award of attorneys' fees in-

curred on behalf of all individually named plaintiffs and members of the class.

COUNT EIGHT

I.

Additional Plaintiffs hereby reiterate paragraphs I through X of their Count Two, and incorporate the same herein by reference thereto as though set forth in full verbatim.

II.

That the Defendant made the following representations to its members, the rank and file of said Union:

A. That it was a competent organization for protecting the welfare, safety and interest of its members, and had a concern for said welfare, safety and interest of its members.

B. That it has a reliable degree of expertise in the safety and welfare field as the same relates to underground mining.

C. That it would develop adequate programs of safety through its union representatives for the benefit of its members, the rank and file of said union.

D. That it would provide competent union representatives to participate in the inspections of the mine for safety and accident prevention.

E. That it would enforce the provisions of the union contract with the Sunshine Mine as the same regarded safety and accident prevention.

III.

That contrary to its representations, the Defendant specifically failed to do the following:

(1) It failed to require mine evacuation on first evidence of smoke underground;

(2) It failed to require fire drills;

(3) It failed to require personal protective equipment;

(4) It failed to require adequate protection against spontaneous combustion of discarded timbers underground;

(5) It failed to require adequate emergency egress from the mine.

(6) It failed to initiate and instigate the formation of any safety programs.

IV.

That all representations made by the Defendant as enumerated in paragraph II above were false and were material to the actions of the plaintiffs' decedents and all of the rank and file members of the defendant, who relied upon the same.

V.

That the Defendant knew that the aforementioned representations were false, or were recklessly indifferent as to whether or not said representations were true and would be acted upon.

VI.

That the Defendant intended that its representations should be acted upon by the injured survivors and were so acted upon by the injured survivors in a reasonably contemplated manner; that the injured survivors were ignorant of the falsity of defendant's representations; that the injured survivors reasonably relied upon the alleged truthfulness of said representations; and that the injured survivors had a right to rely upon the said representations.

VII.

That said representations were made willfully, maliciously and intentionally and with an intent to deceive the injured survivors, and thus constitute actual fraud, thereby supporting an award of punitive damages to all additional plaintiffs and to those included within the class.

VIII.

That the acts of the Defendant hereinabove set forth are such as to support an award of attorneys' fees incurred on behalf of all additional plaintiffs and members of the class.

WHEREFORE, Plaintiffs, Additional Plaintiffs and movants pray:

1. That Plaintiffs be permitted to sue as representative parties on behalf of the class consisting of the heirs at law of the deceased miners killed in the May 2, 1972, fire at the Sunshine Mine in Shoshone County, Idaho, consistent with the provisions of Rule 23, Idaho Rules of Civil Procedure; that additional Plaintiffs be permitted to sue as representative parties on behalf of the class consisting of the other injured survivors so injured in the May 2, 1972, fire at the Sunshine Mine in Shoshone County, Idaho, consistent with the provisions of Rule 23, Idaho Rules of Civil Procedure;

2. That an Order so enter;

3. That each of the heirs at law of the deceased miners, including the members of the class sought to be represented, be awarded damages against the Defendant in such sums as proof may determine;

4. That each of the injured survivors, including the members of the class sought to be represented, be awarded damages against the Defendant in such sums as proof may determine;

5. That the Plaintiffs and all other parties similarly situated, and additional Plaintiffs and all other parties similarly situated, be awarded reasonable attorneys' fees in the prosecution of this action in such sums as the Court may deem proper;

6. That the Plaintiffs and all other parties similarly situated, and additional Plaintiffs and all other parties similarly situated, be awarded their costs incurred in this action and such other and further relief as the Court may deem proper.

7. That all Counts contained herein have jury consideration.

Dated this 11th day of September, 1980.

BRUCE O. ROBINSON, P. A.
BRADLY S. FORD, P.A.

WEBB, BURTON, CARLSON, PEDERSEN & PAINE

THOMAS A. MITCHELL

MAY, MAY, SUDWEEKS & SHINDURLING

MATTHEWS, LEE & WILSON

RAPAICH & KNUTSON

RICHTER, WIMBERLEY & ERICSON

CARTWRIGHT, SUCHERMAN, SLOBODIN & FOWLER

By /s/ Bruce O. Robinson
BRUCE O. ROBINSON
Counsel for Plaintiffs and Additional Plaintiffs

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF SHOSHONE

[Title Omitted]

DEFENDANT'S ANSWER TO AMENDED COMPLAINT

Defendant United Steelworkers of America (hereinafter "the Union"), for its Answer to plaintiffs' amended complaint, alleges as follows:

FIRST DEFENSE

I.

With respect to the allegations contained in Count One of the amended complaint:

A. The Union is without sufficient knowledge or information to admit or deny the allegations contained in paragraphs II, III, IV, V, VI and XVI.

B. As a result of prior rulings of the Court, no response is required to the allegations contained in paragraphs VIII, IX, X and XI. To the extent that a response is deemed to be required, those allegations are denied.

C. The Union denies the allegations contained in paragraphs XIII, XIV, XV and XVII.

D. With respect to the allegations contained in paragraph I, the Union is without sufficient knowledge or information to admit or deny said allegations, except that the Union denies that Glen Raymond Rossiter, Don B. Wood, Wayne Lyle Johnson and John R. Rawson died as a direct and proximate result of the Union's negligence.

E. With respect to the allegations contained in paragraph VII, the Union denies the allegations contained in the second sentence thereof. The Union is without sufficient knowledge or information to admit or deny the allegations contained in the first sentence thereof, except that the Union admits there was a fire at the Sunshine Mine in Shoshone County, Idaho on May 2, 1972.

F. With respect to the allegations contained in paragraph XII, the Union admits that it is a labor union and an unincorporated association, but denies the remaining allegations in said paragraph.

G. With respect to the allegations contained in paragraph XVIII, the Union denies that it caused or is responsible for any general damages to any miners now deceased, or to their estates. The Union is without sufficient knowledge or information to admit or deny the remaining allegations in said paragraph.

H. With respect to paragraph XIX, the Union denies that plaintiffs are entitled to a trial by jury.

II.

With respect to the allegations contained in Count Three of the amended complaint:

A. With respect to paragraph I, which reiterates paragraphs I through XIX of Count One, the Union's response is as set forth in Part I of this First Defense.

B. The Union denies the allegations contained in paragraphs II, III and IV.

III.

With respect to the allegations contained in Count Five of the amended complaint:

A. With respect to paragraph I, which reiterates paragraphs I through XII of Count One, the Union's response is as set forth in Part I of this First Defense.

B. The Union is without sufficient knowledge or information to admit or deny the allegations contained in paragraph VII.

C. The Union denies the allegations contained in paragraphs II, III, IV, V, VI, VIII and X.

D. With respect to the allegations contained in paragraph IX, the Union denies that it caused or is responsible for any general damages to any miners now deceased, or to their estates. The Union is without sufficient knowledge or information to admit or deny the remaining allegations in said paragraph.

IV.

With respect to the allegations contained in Count Seven of the amended complaint:

A. With respect to paragraph I, which reiterates paragraphs I though XII of Count One, the Union's response is as set forth in Part I of this First Defense.

B. The Union denies the allegations contained in paragraphs II, III, IV, V, VI, VII and VIII.

V.

With respect to the portion of the amended complaint which begins with the word "WHEREFORE," and continuing to the end of the amended complaint, said portion of the amended complaint constitutes a prayer for relief to which no response is required. To the extent that a response is deemed to be required, the allegations contained in said portion of the amended complaint are denied.

SECOND DEFENSE

As a separate and distinct defense against plaintiffs' claims, the Union alleges that the Complaint fails to state a claim upon which relief may be granted.

THIRD DEFENSE

As a separate and distinct defense against plaintiffs' claims, the Union alleges that the Complaint is barred by Section 5-219, Idaho Code, the applicable statute of limitations, and/or by laches.

FOURTH DEFENSE

As a separate and distinct defense against plaintiffs' claims, the Union alleges that the Complaint is barred by the failure of the miners whose deaths are alleged in the amended complaint to invoke, exercise and/or exhaust procedures available to them under the collective bargaining contract between Sunshine and the Union.

FIFTH DEFENSE

As a separate and distinct defense against plaintiffs' claims, the Union alleges that to the extent that any duty was owed to the miners whose deaths are alleged in the amended complaint, it was the federal duty of fair representation and it was not breached in this cause.

SIXTH DEFENSE

As a separate and distinct defense against plaintiffs' claims, the Union alleges that to the extent any duty would otherwise have been owed at common law to the miners whose deaths are alleged in the amended complaint, such duty was and is preempted by federal law.

SEVENTH DEFENSE

As a separate and distinct defense against plaintiffs' claims, the Union alleges that even assuming the applicability of common law principles, the Complaint fails to state a claim for relief under Idaho law.

EIGHTH DEFENSE

As a separate and distinct defense against plaintiffs' claims, the Union alleges that even assuming the applica-

bility of common law principles, and even assuming that the Complaint states a claim under Idaho law, the Union owed no duty of care in this case to plaintiffs, nor to the miners whose deaths are alleged in the amended complaint.

NINTH DEFENSE

As a separate and distinct defense against plaintiffs' claims, the Union alleges that even assuming that it owed a duty of care at common law to plaintiffs or to the miners whose deaths are alleged in the amended complaint, and even assuming that the Complaint states a claim under Idaho law, the Union cannot be held liable here because

(a) the Union was not negligent,

(b) the negligence and/or assumption of the risk by the miners was the sole and/or supervening cause of any injury to plaintiffs or the miners,

(c) plaintiffs and the miners waived their rights to the fulfillment of any duty of care owed by the Union,

(d) the negligence of persons other than the Union was the sole and proximate cause of the injuries, if any, to plaintiffs and the miners, and

(e) the negligence of the miners was equal to or greater than any alleged negligence of the Union, and was a proximate cause of any injury to plaintiffs and the miners.

TENTH DEFENSE

As a separate and distinct defense, the Union alleges that the monetary recovery to which plaintiffs were entitled and/or which they already have received under the Idaho Workmen's Compensation Law or from any third party estops plaintiffs from any recovery here, and/or constitutes an offset against any recovery in this case.

ELEVENTH DEFENSE

As a separate and distinct defense, the Union alleges that plaintiffs' claims are barred by the doctrines of res judicata, collateral estoppel, and other applicable preclusion doctrines in that the issue of liability regarding this defendant was litigated in House v. Mine Safety Appliance, a case in which these plaintiffs were parties.

TWELFTH DEFENSE

As a separate defense, the Union states that under the Collective Bargaining Agreement in effect with the Sunshine Mining Company at the time of the underground fire on May 2, 1972 and in accordance with applicable State laws, the safety and health of the employees of Sunshine Mining Company, including the deceased, was the exclusive responsibility of the Company. Further, in any event, the Union did not undertake to act as a guarantor or insurer of any of Sunshine Mining Company's employees, including the deceased, against safety accidents or health hazards.

THIRTEENTH DEFENSE

That article IX of the Collective Bargaining Agreement provided:

> An employee who believes that he is being required to work under conditions which are unsafe beyond the normal hazards inherent in the operation in question, may request an immediate meeting with the shift boss, with or without consultation with his Assistant Grievance Committeeman. If, as a result of these actions, the employee still believes he is being required to work under conditions which are unsafe beyond the normal hazards inherent in the operation in question, a committee consisting of two (2) supervisory personnel and two (2) reliable employees, approved by the Union, shall inspect the op-

eration in question within twenty-four (24) hours and shall decide what steps, if any, are necessary to correct the hazard.

In the event the committee cannot agree, the employee involved may then file a grievance in Step 2 of the grievance procedure. It is understood and agreed that if a grievance is filed on an unsafe working condition, management and Union representatives shall give said grievance preferred handling, and shall expedite its movements through the grievance procedure.

The employee may on request, be relieved from the job and be assigned to other work at the discretion of the Company. If an employee exercises his rights under this section and the Company believes conditions are not beyond the normal hazards inherent in the operation in question, nothing contained in this section shall abridge the rights of the Company under other sections of this Agreement.

Neither shall the foregoing preclude the Company from assigning another employee to the job in question and it is further understood that no employee, other than communicating the facts, shall take any steps to prevent another from working on the job.

That by reason of said provision, each plaintiff's decedent had rights and an opportunity to notify the Union and/or the Company of any conditions which were unsafe beyond the normal hazards inherent in the operation in question. That each plaintiff's decedent failed to exercise his rights and opportunities, and such acts and ommissions were a proximate cause of the damages, of any, suffered by plaintiffs.

FOURTEENTH DEFENSE

As a separate defense, the Union alleges that after this action was commenced, each of the plaintiffs entered into

an agreement to compromise and settle each plaintiff's claim for wrongful death arising from the Sunshine Mine fire of May 2, 1972, against various defendants in the case of House v. Mine Safety Appliance Company in the United States District Court, for the District of Idaho. Said agreements released and discharged said defendants and was for substantial payments of money. Said agreements released and discharged said defendants which were joint tort-feasors. That said agreements and said payments constitute a discharge in full or a discharge pro tanto of this defendant's liability, if any, to plaintiffs in this action.

WHEREFORE, The Union prays that this action be dismissed with prejudice and that the Union be awarded its costs and attorneys fees in this matter.

DATED: April 20, 1983.

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By /s/ Wayne P. Fuller
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[Certificate of Mailing Omitted]

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF SHOSHONE

[Title Omitted]

PLAINTIFFS' ANSWERS TO SECOND SET OF INTERROGATORIES

COMES NOW the above named Plaintiffs, by and through their attorney, Kenneth B. Howard, Jr., and in answer to Defendant, United Steelworkers, Second Set of Interrogatories, do hereby answer as follows:

INTERROGATORY NO. 1: Describe separately and in detail the factual basis of each of the following allegations contained in paragraph XIV of Count One of the amended complaint:

a) That "[t]he Defendant undertook to act as accident prevention representative and enforcer of an agreement negotiated between the said Defendant on behalf of the deceased miners";

b) That the defendant "acted negligently in [that] . . . [i]t misrepresented its safety concern and expertise to the rank and file";

c) That the defendant "acted negligently in [that] . . . [i]t failed to develop adequate safety programs for its union membership";

d) That the defendant "undertook to provide representatives who inspected and pretended to enforce the contractual accident prevention clauses";

e) That the defendant acted "negligently, to wit . . . [i]t failed to require mine evacuation on first evidence of smoke underground";

f) That the defendant acted "negligently, to wit . . . [i]t failed to require fire drills";

g) That the defendant acted "negligently, to wit . . . [i]t failed to require personal protective equipment";

h) That the defendant acted "negligently, to wit . . . [i]t failed to require adequate protection against spontaneous combustion of discarded timbers underground";

i) That the defendant acted "negligently, to wit . . . [i]t failed to require adequate emergency egress from the mine."

(With respect to subparts b, c, e, f, g, h, and i of this interrogatory, the answer should be, *inter alia*, describe in detail each wrongful act or omission which is referred to in the allegations of the amended complaint that are quoted in the subpart, and would describe in detail the factual basis of plaintiffs' contention that such act(s) or omission(s) constituted a breach of a duty owed by defendant to plaintiffs and/or to plaintiffs' decedent).

ANSWER:

(a) The Defendant, International Union, assisted in counsel of the local union and supplied the local union with the basis upon which the contract between the local and the company was made. In the capacity of counselling, advising and assisting the local, the International collected consideration from the local union and the individual miners by way of dues and held themselves out to the local as being experienced in mine safety and able and available to enforce mine safety violations. The International further assisted in negotiating terms in the contract relating to mine safety, which it then failed to follow-up by providing sufficient or reasonable support or technology to enforce those terms. Further answers to this Interrogatory will be provided upon the competion of the depositions of the agents and employees of the International Union scheduled to be taken prior to July 15, 1983.

(b) The Sunshine Mine fire of May 2, 1972, developed as a result of unsafe and improper mining procedures in that the fire developed and spread throughout the mine without sufficient warning to the miners underground, and that the safety appliances provided for the miners were inadequate, defective and improperly maintained in that they were rusted, corroded and otherwise insufficient to provide safe passage for a miner utilizing them and, further, that the miners were inadequately trained in the use of self-rescuers and other safety procedures for mine evacuation. The mandatory standards set forth by the State of Idaho and the U.S. Department of Mines were not complied with with regard to establishing adequate emergency exit procedures and passages. The Union, through the Safety Committee, failed to reasonably perform its inspections, failed to uncover obvious and discoverable deficiencies in the mine safety program, including the above mentioned self-rescuers, an evacuation procedure, improper ventilation, inadequate mine safety training, and other such relevant deficiencies as set forth in the final report from the U.S. Department of Interior relating to the Sunshine Mine fire of May 2, 1972. Further answers to this Interrogatory will be provided upon the completion of the depositions of the defendant's agents and employees scheduled for conclusion by July 15, 1983.

(c) The Defendant Union provided no reliable evacuation drills or fire drills or procedure. It failed to utilize the Safety Committee to educate and acquaint the Safety Committee and its members with sufficient information by which the Committee could perform adequate safety inspections and enforce recommendations and, further, that the Defendant was negligent in failing to develop adequate facilities for ordering the mine shut down and insuring worker safety where evidence of fire existed and that it failed to provide adequate training to establish methods of inspection for determining and detailing inadequate safety equipment, including ventilation, safe

harbor exists, equipment and other such deficiencies as noted in the final report by the U.S. Department of Interior. Further answers to this Interrogatory will be provided upon completion of the depositions presently scheduled to be concluded prior to July 15, 1983.

(d) The Defendant caused to be established a joint management/labor safety committee which, by the contract language, purported to establish influence by the Union on safety measures being taken within the mine for employee safety; where, in fact, those inspections were improperly and inadequately performed because the members of the Safety Committee were not adequately trained or acquainted with measures which could or should be taken, nor were they adequately trained or acquainted with how to properly inspect and what to inspect for. As a result of the failure to adequately inspect the mine working area and failure to adequately develop a systematic method of mine inspection which would have been effectual, the efforts proved ineffectual and served only to provide an "image" of proper inspection. Further answers to this Interrogatory will be provided upon competion of the depositions of the agents and employees of the Defendant scheduled for conclusion by July 15, 1983.

(e) The Defendant failed to provide any guidelines or procedures which would safeguard its members against death and injury due to mine fires by insuring that adequate direction was given in the event of a mine fire and that in the instance of the fire of May 2, 1972, no evacuation order was given and a considerable amount of time passed prior to any warning being given to miners below ground. Further answer to this Interrogatories will be provided upon competion of the depositions of the agents and employees of the Defendant scheduled to be completed by July 15, 1983.

(f) See Answers given to Interrogatory No. 1, a thru e.

(g) The Defendant failed in its duty to perform reasonable inspections and to determine that the personal protective equipment, i.e., self-breathing apparatus and other rescue equipment, including the ventilation system, hoist-way, notices of evacuation routes, evacuation procedures, etc., were maintained in a manner sufficient to enable the reasonable evacuation of the mine in a safe fashion. The Defendant also failed to properly inspect and determine whether or not the warning system was adequate and proper procedures were in place to initiate the warning system upon the happening of an emergency or need for evacuation. Further answer to this Interrogatory will be provided upon completion of the depositions of the Defendants agents and employees now set for competion no later than July 15, 1983.

(h) The Defendant failed to properly conduct safety inspections to determine potential sources for ignition and also to discover potential sources of fuel for underground fires and that the members of the Union involved in the joint Safety Committee were not sufficiently informed and instructed in order to provide adequate or reasonable inspections of the mine area. Further answers to this Interrogatory will be provided upon competion of the discovery depositions presently set to be concluded by July 15, 1983.

(i) See Answers given to Interrogatory No. 1, a thru h.

INTERROGATORY NO. 2: Do plaintiffs contend that the defendant is liable for any acts or omissions besides those described in the answer to Interrogatory 1? If the answer is yes, identify each such act or omission, and for each such act or omission, describe in detail the factual basis of plaintiffs' contention that the act or omission was wrongful.

ANSWER: Yes. Failure on the part of the Defendant to properly train, identify, inform and develop procedures and work rules relating to all of the short comings which were a proximate cause of the death of the decedents as outlined in the final report of the U.S. Department of the Interior are items which the Plaintiffs contend the Defendants were negligent in performing. Reference should be made to the final report for those specifics.

INTERROGATORY NO. 3: Identify each act or omission of the defendant which plaintiffs contend was jointly and/or severally a proximate cause of plaintiffs' decedent's death, and for each such act or omission, describe in detail the factual basis of plaintiffs' contention that such act or omission was a proximate cause of said decedent's death.

ANSWER: See the Answers to Interrogatorys number 1 and 2, and see the U.S. Department of Interior, Bureau of Mines, Health & Safety Report—Final Report of Major Mine Fire Disaster, Sunshine Mine, May 2, 1972, by Stanley M. Garrett, E. Levi Brake, Robert C. Riley, Roland V. Wilson.

INTERROGATORY NO. 4: Identify each act of the Defendant to which Plaintiffs refer in paragraph II of Count Three of the amended complaint which alleges that "the acts of the Defendant as specifically set forth in paragraph XIV of Count One were willful, wanton, reckless and grossly negligent, and for each such act describe separately and in detail the factual basis of Plaintiffs' allegations that the act was wilful, wanton and grossly negligent.

ANSWER: The answer to this Interrogatory must await the outcome and completion of the depositions of the agents and employees of the Defendant scheduled for competion prior to July 15, 1983. The essential acts and facts upon which this claim is based are the same as those set forth in answers to earlier Interrogatories.

INTERROGATORY NO. 5: Identify each act on the part of the defendant to which Plaintiffs' refer in paragraph III of Count Three of the amended complaint which alleges that "the hereinabove set forth acts on the part of the Defendant were such that they support the award of punitive damages" to Plaintiffs, and for each such act describe separately and in detail the factual basis of Plaintiffs' allegation that act was such that it supports the award punitive damages to Plaintiffs.

ANSWER: See Answer to Interrogatory No. 4.

INTERROGATORY NO. 6: Describe in detail the factual basis of the allegation in paragraph IV of Count Three of the amended complaint that "the acts hereinabove set forth . . . on the part of the Defendant are such as to support the award of attorney's fees incurred on behalf of (plaintiffs)."

ANSWER: See answers to above Interrogatories. Further, it is the position of the Plaintiffs that the action is defended without foundation and frivolously and, further, that attorney fees are allowable under Idaho Code § 12-121.

INTERROGATORY NO. 7: With respect to each of the "representations" described in subparagraphs A-E of paragraph II of Count Five of the amended complaint, which the defendant is alleged to have "made . . . to its members, the rank and file of said Union," describe in detail the factual basis of the allegation that such representation was made. (For each such alleged representation, the answer should state, *inter alia*, the individual(s) who made the representation, the individual(s) to whom the representation was made, any and all witnesses to the making of the representation, the date(s) on which the representation was made, the form(s) in which the representation was made (e.g., oral communication, letter, bulletin, etc.), and the exact content of the representation).

ANSWER: The complete answer to this Interrogatory must await completion of the depositions which are presently scheduled to be concluded by July 15, 1983.

INTERROGATORY NO. 8: With respect to each representation described in the answer to Interrogatory 7, state separately whether Plaintiffs make any or all of the following contentions, and for each such factual contention made by Plaintiffs, describe separately and in detail the factual basis of the factual contention:

(i) That the defendant acted (or failed to act) in a manner which as contrary to its representation;

(ii) that the representation was false;

(iii) That the defendant knew that the representation was false (if plaintiffs contend that it was false);

(iv) That the defendant was recklessly indifferent as to whether or not the representation was true and would be acted upon;

(v) That the representation was made willfully, maliciously and intentionally and with an intent to deceive plaintiffs' decedent;

(vi) That plaintiffs' decedent was ignorant of the falsity of the representation (if plaintiffs contend that the representation was false);

(vii) That plaintiffs' decedent relied upon and/or acted upon the representation to his detriment (and if so, state whether plaintiffs contend that such action and/or reliance by their decedent was reasonable);

(viii) That the defendant intended that the representation should be relief upon and/or acted upon by plaintiff's decedent; and

(ix) That the representation was jointly and/or severally a proximate cause of plaintiffs' decendent's death;

b) In each instance where plaintiffs do so contend, describe in detail the factual basis of said contention.

ANSWER: The complete answer to this Interrogatory must await completion of the depositions which are presently scheduled to be concluded by July 15, 1983.

INTERROGATORY NO. 9:

a) Describe with particularity each and every respect in which plaintiffs contend that the acts or omissions of the defendant alleged in the amended complaint caused damage to them and/or their decedent, and for which plaintiffs contend that they are entitled to recover damages from the defendant.

b) For each item or damages described in the answer to subpart a), state the dollar amount of the damages which each plaintiff contends he or she is entitled to recover.

c) Describe in detail the factual basis of each contention stated in the answer to subpart a) and b).

ANSWER: The complete answer to this Interrogatory must await completion of the depositions which are presently scheduled to be concluded by July 15, 1983.

INTERROGATORY NO. 10:

a) With respect to each of plaintiffs' answers to Interrogatories 1-9, and all subparts thereof, identify separately for each answer:

i) All documents known to plaintiffs or to any person acting for them or on their behalf, including their attorneys, which describe, refer to, support, contradict, or relate to the statements made in the answer; and

ii) All persons known to plaintiffs or to any person acting for them or on their behalf, including their attorneys, who have knowledge or information that is or may be relevant to the statements made in the answer.

b) i) At any time during the period in which plaintiffs contend that the defendant committed wrongful acts alleged in the amended complaint, and/or during the period in which plaintiffs contend that they or their decedent suffered harm for which plaintiffs are entitled to recover damages from the defendant, did any of the plaintiffs or their decedent maintain a diary, calendar, journal, notebook, or other writing or set of writings in which any of the plaintiffs or their decedent made reference to events affecting him or her?

ii) If the answer to subpart (i) is yes, identify each such document.

ANSWER: See answers to preceding Interrogatories.

DATED this 9th day of May, 1983.

/s/ Kenneth B. Howard, Jr.
KENNETH B. HOWARD, JR.
Attorney for Plaintiffs

[Certificate of Mailing Omitted]

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF SHOSHONE

[Title Omitted]

ANSWERS OF UNITED STEELWORKERS OF AMERICA TO INTERROGATORIES TO DEFENDANTS

INTERROGATORY NO. 6: Please set forth the names, addresses and position held with the Defendant of all persons charged with the responsibility of assisting the various local unions with job safety training, mine safety inspection procedures and enforcement of safety violations within the mines in the 1962 thru 1972 era.

ANSWER: The Steelworkers do not employ any persons who are "charged with the responsibilit[ies]" as described in the Interrogatory above. The Safety and Health Department consists of a Director and a small group of persons whose function it is, on behalf of the International, to provide general advice, guidance and education to local union Safety Committees concerning various safety and health matters. In addition, the Safety and Health Department, in conjunction with the Legislative Department, participates in efforts to initiate and support the enactment of federal and state laws designed to protect workers from safety and health hazards, such as the Occupational Safety and Health Act of 1970 and the Federal Metal and Non-Metallic Mine Safety Act of 1966, and/or to support efforts to strengthen existing laws. Members of the Safety and Health Department

also serve on committees at the national, state and local levels whose jurisdiction involves safety and health legislation, air pollution, and standard setting (e.g.).

A review of the personnel records indicates that during the period 1962-72, the following persons were employed in the Safety and Health Department:

Directors

Frank Burke—at least as early as 1966 until 1969 (address unknown);

Paul E. Schremp—1969—March 1972 (address unknown);

Adolph Schwartz—April 1, 1972—February 1983

Other personnel

Marco Vestich—Assistant to Director, June 1, 1969 —May 1979

Adolph Schwartz—Assistant to Director, June 1969 —March 31, 1972

Francis Grimes—member of staff of Safety and Health Department from approximately February 1971 until appointed Director in February 1983.

* * * *

ORAL DEPOSITION OF LAVERN ALBERT MELTON TAKEN JULY 6, 1983

* * * *

[3] Q Prior to that, as I understand it, you were the President of a Local over in the Kellogg area?
A Yes.
Q I'm sorry, I forgot the number.
Mr. COHEN: 5089.

* * * *

[15] Q I recall seeing someplace, Mr. Melton, a letter that you had directed to Mr. Atha. I believe Mr. Atha

was the safety engineer with Sunshine prior to Mr. Longhart, and I recall a letter that you had written just shortly before the fire complaining about certain portions of the mine not conforming to federal requirements for dual access. Do you remember that letter?

A Yes.

Q Can you tell me in as best detail as you can recall, what brought that to your attention, that particular condition?

A I worked on shaft repair, and quite often we have tie-ups in the shaft, or the rig in the shaft, which immobilizes the shaft. I can't really say what called this to my attention. I don't know if a co-worker complained to me.

Q A what?

A Co-worker called it to my attention or if I became aware of it just from my working with the shaft and being adjacent to that working area. I really don't recall now how I became aware of this, but I became aware of it and there was, I remember the argument was that the company published in a newspaper that production had started on this level, and I knew that they should have a secondary escapeway before production started, and they made my complaint based on that.

[16] Q What level was that?

A I don't recall.

Q How did you become aware of the fact that a secondary escapeway should be provided; how did you know?

A I read—I, well, I really can't say. I can guess. I probably read it in the State Code.

Q What did you do as a result of this information being passed on to you?

A I am not sure the information was passed on to me, or if I—

Q Or if you came up with it yourself; once you got it, however you got it—

A I called the company's attention to it.

Q How did you do that?

A By the letter.

Q Was that letter offered by you?

A Yes.

Q Is there any particular reason why you went that route as opposed to going to the Joint Safety Committee?

A Well, you can't—I wasn't a member of the Joint Safety Committee.

Q I understand that. Why didn't you refer it to them?

A The Joint Safety Committee meets once a month and if I could see something that I thought should be addressed, I would address it.

[17] Q Is there some reason you used the letter approach as opposed to the grievance approach?

A Well, you can't file a grievance on a safety matter.

Q You can't file a grievance on a safety matter?

A No.

Q Could you explain that to me?

A Well, if there is a safety recommendation that is made, it is not something that is subjective to grievance procedures, and the way that the Joint Committee functions is that the company has to approve a recommendation. The general manager, my manager has to approve, and if he didn't approve, well this meant that you had to have a majority of the Safety Committee members' agreement to make a recommendation in the first place, and the Safety Committee, the company is part of the Safety Committee. It is a joint committee. They would also refer the matter to the mine manager before they would say anything. They would not act independent of my men, and so their recommendation would come from the mine manager, and of course to get a majority vote we would have to have one of the company people rule against management. I have never experienced that happening before.

Then the other way is if you have something that was immediate danger, then you take, and if the majority of the committee would agree, that there is something wrong, then that would be subject to the grievance procedure; but just the [18] routine everyday, I guess probably you'd say things that were not of immediate concern wouldn't be subject to the grievance procedure, even if the parties made recommendations and the company didn't follow them. Only just the things that had to be immediately handled.

Q You lost me a few sentences ago when you said something about if it was an immediate problem, and if the committee agreed, then you could submit it as a grievance. Would you explain that for me?

MR. COHEN: Why don't you go through the agreement?

A Probably the agreement speaks for itself better than I could speak for the agreement. This is when an individual has a particular working agreement—page 30, it is Article 9, Section 6. What it says if the company concurs with you that it should be taken care of if then for some reason it isn't taken care of, then you can file a grievance, but the company has to agree with you and something has to be done before it is subject to the grievance procedure. If they disagree with you to start with, there is no contract lineage decrees.

Q (By Mr. Howard) So you didn't use either one of those avenues then in your case, you used a third avenue which was just a direct letter to the safety engineer?

A Yes.

Q What results, if any, did you get from that letter?

A Oh, the company said that I was—the gist of it was [19] that I was misinformed, that the newspaper article was a, I guess it was bragging about how quick they were going to get the work done, but the newspaper article was not correct. There was no production. They fully intended to do exactly what they were supposed to do before production, so I guess what they told me was

that I was making a complaint over a circumstanee that hadn't happened yet.

Q Did the issue drop at that point or was there something further done by you, or by them?

A As far as I know, the company did go ahead and drive the rigs before there was any production.

Q And provided a second escapeway at that particular level?

A Yes.

Q What other avenues were available to you to have corrected the deficiencies that you noted at the mine? We have already discussed the Safety Committee, the individual grievance approach, and then you have developed a third approach on your own initiative of writing letters to the safety engineer.

A That was really, that approach is really part of the other approach that we have, is making complaints to the federal and to the state mine inspectors, and the letter-writing. In fact, I consulted with the state as part of my letter-writing; just really why I wrote the letter, more or [20] less confirmed what I said to the state and what the state said to me. I guess that is what we relied on mostly, is the state rather than the federal. We relied upon the state mine inspectors. If we had a problem we would say hey, fellows, why don't you come out and look at this and see if it is a violation of state code. If it is, see if we can do something about it.

Q Did you also have that relationship with the federal inspectors?

A No.

Q There were federal regulations at the time of the fire in May of 1972; isn't that correct?

A Yes.

Q They had been in effect a few years at that time; is that right?

A Yes.

Q Would you on occasion call the federal inspection when you felt that conditions weren't being corrected?

A Probably, but I don't recall.

Q You had a longer relationship with the state, I take it that is the reason you would call them?

A The problem is the state code said that the state safety regulations had to equal or exceed the feds, so we preferred to rely on the stronger hold.

Also the company would not allow walk-arounds with [21] the federal people, so we didn't have contact with the immediate federal people. I didn't know who they were. But when they would come on the property, we couldn't go on them with the walk-arounds, so we were sort of isolated from the federal people. I didn't know their names, I didn't know who they were. I knew they came, I knew they went through the mine and they were sort of separate entities. So we relied on the state. I knew the state people that—I knew the code was stronger, or at least as strong, and we could go on the inspections with them.

Q When the federal people were involved in inspecting the mine, did you ever approach them with this problem that you were not able to accompany them on these inspections, and you felt that—

A I'm certain that I did and—

Q Did you get any relief at all from them?

A No. There was no—no, all they knew is what the code says, and the code didn't call for it so—

Q Didn't call for a representative?

A For a walk-around. For participation.

* * * *

[23] Q * * * Were you the primary contact with the Local Union, with regard to contacting the state people and the company?

A No.

Q With regard to safety?

A (Witness shakes head negatively.)

Q Who was?

A Whoever wanted to be.

Q Did you have anybody designated from the Union to—

A We had our Safety Committee.

Q There was a chairman of the Safety Committee, or some kind of a—

A There was a chairman of the Union, which is part of the Safety Committee. There was a chairman of the company which was part.

Q That was Mr. Beehner?

A Yes.

Q He died in the fire; is that right?

A Yes.

Q Mr. Beehner, was he then the appointed individual to contact the state or company with regard to safety complaints?

A I don't think that would be a fair statement.

[24] Q Was there any organization to the way that things were done, or did he just happen to be—

A Whoever happened to be there. We had a Safety Committee, the Safety Committee would meet monthly. The Safety Committee would go on walk-around inspections with the state people. They would talk with the state people once a month on these walk-arounds, so there was a good routine established method of continual contact with the state authorities.

Q And who was the principal contact then, was it Mr. Beehner?

A That would be Mr. Beehner.

MR. COHEN: I think one problem we have got here is the question of who is the contact. There is the presence of people, that is the company people. There is the presence of state people. I think your question, Ken, is predicated on the motion that you always have to be going and communicating to get someone to come there. I think that is—

A They were on the property.

Q (By Mr. Howard) I don't mean to presume anything. Whatever the facts, the contact I was wondering about was whether it was channeled through one individual so it could be coordinated.

A Don and myself both worked eight hours a day in the mine. I worked graveyard. That meant I would change into my [25] street clothes when the day shift people were coming in to work. I had an opportunity to see everybody in the mine that wanted to see me every day, and then when I went to work and I went to work when the night shift, when the second shift was coming off shift, so I had probably contact with everybody underground on a daily basis. If I recall right, I think Don was on a straight day shift and that is why, that is another reason why I liked Don on that committee, because his job was a straight day shift job, and the mine rotates two weeks day shift, two weeks night shift, so if I had a person who was a day shift employee, then he would never see the night shift people, because when he was night shift then they were day shift. That was one of the criteria that I looked for on the Safety Committee, a person that—in fact, Alexander was the chairman of the committee before Don, and Don got shifted to a rotating shift, or not Don, but Bud Alexander, and Bud got shifted so he would change with the crews, so that he came to me and told me, you know, I just can't be as effective this way, you should get somebody that has a straight day shift. That is one of the reasons that I picked Don, so we had among ourselves, we had constant contact with all of the employees on a daily basis, and we had constant contact with the federal authorities on a monthly basis.

Q And the constant contact with the employees was important for what reason?

[26] A If the employee had any concern for safety, or any concern for anything, as far as that goes, but on the Safety Committee, he would be able to take and relate his concern to the Safety Committee people. He could

relate his concern if it was a non-safety item to the grievance people, or to me.

(Discussion held off the record.)

Q We were back at a point where I think you were talking about, he could contact the grievance people if it was a non-safety item, and he could contact the safety people if it was a safety item.

A Uh-huh. In fact, Gordon Walkup was on both committees. He was a Safety Committee person and a Grievance Committee person.

Q I could see where there would be some overlap, depending on the situation if it was an immediate safety problem there may also be a grievance; is that right, it may qualify as a grievance?

A No.

Q All right, I thought we—maybe I'm mixed up with Mr. Marshall's deposition, but I thought that if the worker was confronted with an immediate safety hazard, that he could, and it may be grounds for a grievance. Do you recall any procedure like that?

MR. COHEN: If you are paraphrasing Mr. Marshall's [27] answer, I think you ought to go the one step further. He said that if it was an immediate hazard that threatened the safety, there was a provision under the safety article language to do certain things, including filing a grievance.

A If an individual came to me, or to Don, and said, "I saw some loose ground in this area and it should be taken care of," just as a concern for his fellow men, this wouldn't be subject to the grievance procedure. If the company didn't want to take care of it, we have called the state people or we have called the feds, but if the guy is in the condition where he has to work under that loose ground, he has a right to speak and refuse to work. He has a right to go home and then the grievance procedure comes in on an individual's concern, but there are, these are two different areas: concern for my fellow worker where it doesn't really bother me—

Q That is a Safety Committee concern?

A Well, it is all, everything is concerned with the Safety Committee, but the individual cannot file a grievance on an unsafe condition that he thinks may hurt somebody, but he can if it is going to put his life in peril, and he says, "I don't want to work there", and he has a right to refuse, and if the company protests, he has a right to reassign or to go home and then the whole thing gets pretty involved on an individual's concern.

* * * *

[36] MR. COHEN: He has got a question that is pending. I think you had a question pending that was, "Was anything done relating to evacuation plans at any time prior." He has a question to you whether any time prior to May of 1972—Okay, we know what your situation was, let us focus on that question and see if you can answer pre-May 1972, did you do anything in your official capacity as the President relating to evacuation plans?

A Well, the only thing I can recall was that they had a fire, and they had an evacuation man, but they didn't evacuate them. They didn't warn anybody, and I was a little bit awed over that, because I thought they should notify, at least notify the people. They didn't even notify the state when they had a fire.

Q (By Mr. Howard) This was just like six months to a year before the disaster?

A Just, probably; I can't really recall, but it wasn't, see we had two situations. We had a fire in the mine, and then [37] we had a forest fire. We were concerned that they put half the guys fighting the forest fire, and the other half underground to work. We didn't like that. We thought they shouldn't have been sent forth to the other fire. The men were underground, and they didn't warn them, and they didn't get them out, and I wanted them to—I thought they should have done this and they didn't.

MR. COHEN: Okay, the pending question, you have told us the circumstances. What if anything did you do?

A Well, I checked with the state, and the state told me that they didn't know anything about it, so they came out and investigated, and they found out the Stench Warning System wasn't hooked up, and I didn't know what the Stench Warning System was, and I still don't, but anyway then they assured me that Sunshine took care of it.

MR. COHEN: Who is they?

A The state. Spear was the guy we talked with. He said that they have taken care of the situation, and it won't happen again.

Q (By Mr. Howard) That was the occasion where the fire occurred underground? It was some kind of an electrical short that started the fire?

A I can't really remember, gosh, it's been so long, you know, fires are not that uncommon, small fires.

Q Underground?

[38] A No, even to this day, there is probably a fire almost every month, but they are always small, and I just can't recall. I think this was an electrical short that burned a post and cap, but I am not sure. It was an electrical fire.

Q As a result of that knowledge, on your part, though, where you know that fires occur regularly underground, did you ever inquire as to a training program for the orderly evacuation of miners in the event of a major fire?

A The company assured me that they had an escape plan, and that it was posted, and everybody could read it and that it worked.

Q They assured you that prior to the May 2 fire?

A Pardon?

Q They assured you of that prior to the May 2, 1972, fire?

A I don't know if they assured me—I don't think that would be the proper term, but the state and the—

I can't remember who I talked with, but they told me that Sunshine had a plan and I don't know if the state said it was, anyway, there was nothing we could do about it.

Q This was prior to the May 2 fire?

A The main thing I wanted to take and have a drill, you know. Everybody told me that the company says there was no problem, because there is no reason to have a drill, because [39] all you are going to do is, they accused me of wanting to interrupt production. They said, you know, Melton, all you are going to do is shut the mine down for a day to have a drill on a plan that is going to work. There is no point in having the drill. The state and the feds said that there was no law that requires them to have a drill to evacuate the persons to the surface.

Q Your request to have that drill was prior to the May 2, 1972, fire?

A I can't say definitely. I think so, but I can't say. I'm sure it was, but—

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[52] Q What was your job as President, as it relates to the Safety Committee?

[53] A Well, I appointed the committee and we called for the committee reports at Union meetings, monthly, and listened to the report and communicated with the—you see, it was a real small group of persons. It has 500 people. It was a large group, but it was a pretty close-knit group. You all shower in the same area at the same time. You all change clothes together, so we saw each other on a daily basis. It is not like a committee that, you know, exists somewhere, but you see seldom, because we were in constant contact with each other daily.

Q I appreciate that you were probably in constant contact with them, personally as well as having an opportunity to talk with them—

A Even off the job at the bars.

Q What was your job as President, what did you conceive your job as President to be?

A To conduct meetings, appoint committees.

Q When they say you are an ex-officio member of the committee, as far as the Union is concerned, what does that mean?

A That means that you are a part of the committee, but you have no voice or vote, especially vote.

Q Were any members of the Steelworkers Union, prior to May 2, 1972, what you would say experts in mine safety?

A Not that I know of.

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[68] Q (By Mr. Howard) What was the Union's job with regard to safe working conditions?

MR. COHEN: I am going to object to that question as having been asked and answered.

A I really don't know. I don't even know what you are asking: What was the Union's job?

Q (By Mr. Howard) Yes, with regard to safe working conditions at the mine. Did they have any responsibilities at all?

A Represent the employees.

Q In what fashion?

A If they had a complaint, process the complaint; if they bring anything to our attention that should be brought to safety meetings. I guess talk to the employees on a daily basis, which we did, and convey any concerns that we had to the company.

Q How about doing independent investigations or inspections of the mine to determine safe working conditions? Did you have any obligation in that?

A I'm sure every employee did this on a daily basis.

Q How about the Safety Committee, did they have any obligations in that regard?

A I think they probably, on a daily basis, where they were working in the mines. See, not all of the committee members worked underground, but the ones that worked

underground, [69] I'm sure that they would observe what is going on around them on a daily basis.

Q What was the obligation—

MR. COHEN: I am going to object to the use of the word obligation. It calls for a conclusion. Why don't you ask him to re-phrase that?

Q (By Mr. Howard) Well, I am going to continue to use that phraseology at this point in time.

A I don't understand really what you mean by obligation.

Q Do you know what the term obligation means?

A I don't know how you view it. I am not sure. I would have to look it up in the dictionary.

Q What was the responsibility of the Joint Staff Committee?

MR. COHEN: Objection to the use of the word responsibility. Why don't you talk about the function, that's okay. The word responsibility is a word that has legal connotations to it, and I object to the use of the word responsibility. Go ahead, answer.

A The function of the Safety Committee was to convey employees' concerns to the company.

Q (By Mr. Howard) Is that all?

A To meet monthly, to meet as the labor agreement says with the plant manager concerning any safety and health [70] matters; but not to handle grievances.

Q Is that all?

A I could read this whole thing here.

Q Was it part of their job to work toward the objective of eliminating accident and health hazards?

A Let me read this. What was the question again now?

Q Was it part of their job to work toward the objective of eliminating accident and health hazards?

A This is what the labor agreement says.

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ORAL DEPOSITION OF AUSTIN SMITH
TAKEN JULY 7, 1983

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[12] Q Did you personally service the Coeur d'Alene mining district outside of the 1953-1954 era?

A Yes, but only on a spasmodic basis, to replace somebody.

Q I take it that the Coeur d'Alene mining district had its own Staff Representative after its organization?

A Yes.

Q That was not you, it was somebody else?

A. Yes.

Q Have you ever had occasion to deal with the Safety and Health Department back in Pittsburg?

A No.

Q Are you familiar with any of the information or documentation that they published and sent out concerning health or safety?

A Only what would be passed through the office to be channeled to Local Unions.

Q Are you familiar with any kind of a book, safety book, that they put out?

A No sir.

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ORAL DEPOSITION OF LAWRENCE MARSHALL
TAKEN JULY 7, 1983

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[9] Q One of your functions was as an organizer, as well as other functions that you indicated to me a few minutes ago: elections, assisting the membership, etc.?

A Right.

Q I take it that your original functions in the Wallace-Kellogg area, you presently were involved in the organizing aspect of your job, that is the reason that you call yourself an organizer; is that right?

A Yes.

Q The other aspects of the job of staff representative, which is to assist in the negotiating and handle the Four Step grievances, the elections and that sort of thing; did you receive any training in regard to those aspects of your job of staff representatives?

A No.

Q Did you receive any written material, any kind of manuals or instructions, or job descriptions or anything like that to indicate to you what your job function was, let's say in the area of negotiating labor agreements?

A No, I did not.

Q Initially, and now we are still talking back in the 1967 era, was there any hierarchy within the Steelworkers that you would go to with advice, if you were involved in, let's say, handling the Four Step?

[10] A Austin Smith.

Q Was he like a senior?

A He was a subdistrict director.

Q What sort of function did the subdistrict director have then? Was that basically to advise and direct you?

A Yes.

Q To provide you with information that you needed, upon request?

A Yes.

Q When you were involved in your capacity, and involved in the negotiation of labor agreements, in the initiation of the negotiation, would you be supplied any goals from the International that you would use to help develop the negotiations? Did my question make sense to you?

A Generally there is what we call the Wage Policy Committee which sets various goals for the Steelworkers, and many industries.

Q And the Wage Policy Committee, was that to make some sort of written recommendations or directives to you as a field man?

A Not to me, no.

Q How would you as a field representative involved in the negotiations, become aware of the national policies for that particular year?

A By attending conventions and conferences.

[11] Q Besides obtaining information verbally of these conferences, was there information or goals that was developed in written form?

A There would be wage policy statements, yes.

Q How about other aspects of the contract, other than wages?

A Well, the wage policy, meaning that in a statement itself, it includes other items, other than wages.

Q Does it include such things as health and safety?

A Yes.

Q So the Wage Policy Committee set the national goals, if you will, for all aspects of negotiation; not just wages, but—

A Yes.

Q As you went in negotiations, initially with the company, at the end of a contract, would you have provided to you, the essential format of a proposed new contract?

* * * *

[12] Q (By Mr. Howard) Let me isolate my question then, to the Wallace/Kellogg area in 1967, the 1967 era that may have not been a negotiating year, but would you have been provided with anything in writing that set forth essentially what you were proposing as a contract?

A I may have, but I really am not sure. I just don't remember, Mr. Howard. I could have at that point in time. I don't think that was the year. It was just prior to that when we negotiated the agreements, in '67, because there were several contracts that fell at different dates.

Q At different Locals over there?

A Yes.

Q What I am trying to get a handle on, Mr. Marshall, is I would imagine that representing the Steelworkers International, you wanted to see some consistency between contracts, within your subdistrict; is that correct?

A Well, we always strive to better or improve our labor agreements in all of our contracts, especially the area in which I worked, the Kellogg area.

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[13] Q (By Mr. Howard) Again, my question is looking essentially for procedure at this point in time, and if my question presumes the wrong things, feel free to tell me so.

A Okay.

Q What I am looking for, what kind of guidance you were given or what kind of guidance was provided you from the International to assist you in developing these local contracts?

MR. COHEN: Which local contracts?

MR. HOWARD: The Wallace-Kellogg area.

MR. COHEN: By that you mean just mining, or are you talking about anything?

MR. HOWARD: Anything he was involved in as a staff representative in that area.

A Well, really we didn't have any set policy for any particular mine. Of course, we were always striving to improve the wages, hours and working conditions of all of the properties that we were representing, and to improve the contracts, and so that is how we would do it. So there was really no set policy as such, only to improve what we had in existence at [14] the time.

Q (By Mr. Howard) But when you say to improve something, I would imagine you were going to take what was in existence at the time, and you were going to increase it to some level?

A Yeah.

Q How did you determine what level you were going to increase it to, whether it was wages or other working conditions?

A Usually by the membership.

Q The membership of the Local Union?

A Yes.

Q You indicated before there was a Wage Policy Committee. Was that on a national scale?

A Yes.

Q Is that Wage Policy Committee, did they issue a report of their findings or recommendations?

A Yes.

Q Were there also other subdistricts or subareas of the Wage Policy Committee that would issue recommendations?

A No.

Q So the International itself would make certain recommendations in terms of policy, through the report of the Wage Policy Committee; is that correct?

A Correct. The Wage Policy Committee is a committee [15] of various Local Unions, all over the United States and Canada, and through the assistance of the International office, they developed policies pertaining to the various sections of the labor agreement which we should strive to improve our labor agreements on.

Q Right.

A Now, as far as the area is concerned, no we didn't have anything per se to strive for; only to improve our agreements.

Q When you say an area, you are talking about geographic areas, like Wallace/Kellogg?

A Yes.

Q But you would, as a local staff representative, then you would be guided by the Wage Policy Committee report?

A Not necessarily.

Q In terms of goals and national goals?

A Not necessarily.

MR COHEN: What we still haven't done here, Ken, I think what the problem the two of you are having, we haven't yet tied down the question of which industries, or whether or not the Wage Policy Committee "goals" applied to the industries you are talking about.

Q (By Mr. Howard) Let's go back into that, then. Let me start from a very basic standpoint, again, because of my ignorance of your area of work. This Wage Policy [16] Committee and the International, what industries does it represent?

A Basically steel, aluminum and cans, basically in those days.

Q In those days, we are talking about 1967 now?

A Yes.

MR. COHEN: Now, once again I am not objecting, obviously to your inquiring of this man's knowledge. The best evidence is the accuracy of the documents which are reflected in the International Union records, and you are aware of that?

Q (By Mr. Howard) Okay. The Steelworkers, however, had organized other industries besides the steel and aluminum and can industries; is that right?

A Yes.

Q What other industries had the Steelworkers organized, besides these three that you have identified for us?

A In the Kellogg area?

Q Nationally.

A There are many.

Q Give me some examples.

A The non-ferrous industry is what you are primarily discussing right now, is non-ferrous.

Q The non-ferrous industry involved all aspects from manufacturing through extraction and everything?

[17] A Yes, mining.

Q I take it the Steelworkers then had organized certain mining activities throughout the United States?

A Yes.

Q Did that include hard rocks as well as coal?

A Mainly hard rock. We may have had some coal, but I don't have a knowledge of that.

Q What was the extent of the representation by the Steelworkers, in the mining industries in 1967? Do you know industry-wise, do you have 5%, 10% of the mining industry?

A I have no idea.

Q Were there other areas that were organized, nationally, by the Steelworkers in mining, other than the Wallace/Kellogg area?

A Yes.

Q If you know, what other geographic areas were represented in the 1967 era?

A I'm sure we had the iron ore range in Minnesota. We had the copper industry in Arizona, New Mexico, Wyoming, Montana, California; virtually all over the United States and Canada.

Q Representation of miners was not a new endeavor of the Steelworkers at that time then?

A No.

* * * *

[24] Q So at the time of the fire at the Sunshine on May 2, 1972, there was a contract that was in effect at the time involving the International; is that correct?

A Yes.

Q That contract was entered into on what date; do you remember?

A March 11, 1970, I believe the date is.

Q And I take it negotiations for that contract would have involved some time period prior to March of 1970?

A Yes.

Q Do you know how long a period of time was involved with the negotiation of that particular contract?

A The agreement provides that we open the agreement no earlier than 90 or later than 60 days prior to the expiration of the agreement; so at that period of time, I would, after the 90-day period, I would write a

letter to open the agreement with management, and from that point on, we would set up meetings.

Q You would initiate those negotiations, would you, as a staff representative?

A I would assist, yes.

Q How would they be initiated? You said by a letter from you?

A I, being the International representative, staff representative, I would send a wage re-opener to the company [25] with a copy to the state and federal agencies which is required under the opening procedure, and notify them we were willing to meet with them to negotiate a new labor agreement.

Q Was that the first contract, the one in March of 1970, that you had been involved in negotiating as a staff representative?

A Yes.

Q Had you been involved in any contract negotiations, at any other capacity, prior to that?

A With Sunshine?

Q Yes.

A Earlier in 1967 and in 1964, just to set in negotiations, but not to negotiate.

Q In what capacity were you involved in the 1967 and 1964 negotiations? You said you just sat in.

A I was an organizer in the Kellogg area at that time, and in 1964 we had a labor dispute, and I assisted in handling the strike funds for assistance for the membership.

Q Did you sit through the entire contract negotiations in—

A No I did not.

Q In 1967 and '64?

A I did not.

Q I take it there were just several meetings that you attended?

[26] A Yes.

Q The 1970 contract negotiations, could you describe for me the organization that represented the Union at those negotiations? I take it there was a staff representative there. Were some Local Union people there also?

A Yes. In 1967, there was myself as a staff representative, Austin Smith, the subdistrict director—

MR. COHEN: Are you talking about 1967, or 1970?

THE WITNESS: 1970 he said.

Q (By Mr. Howard) 1970 is what I asked. You just said '67.

THE WITNESS: Oh, I knew we were talking about '70. 1970, excuse me. In 1970 there was myself, and Austin Smith representing the International Union for the Local Union. The president was Richard Fleming. George Gibson—

Q He was also the vice-president, wasn't he?

A Yes. Richard Terrel, I believe. May I refer to the—

Q That's all right. What I am basically asking for, is their positions. I don't care if you remember their names. You have already indicated in the other deposition the members that you remember in the grievance stage itself, as to who was there.

A Yes.

Q They would have been making the negotiations on [27] behalf of the Union then?

A Yes.

Q Who led that group? Who was the coordinator on behalf of the Union?

A I was usually the spokesman for the negotiations.

Q Was Austin Smith there on a full-time basis during those negotiations?

A Usually.

Q Did he have less experience than you in this particular area of negotiations?

A No he had more.

Q Why was it that you were the spokesman?

A Because I was the service and staff representative.

Q And he as the Subdistrict Director apparently had other districts under his—

A He had other local unions which he was assisting, other than mine.

Q Do you remember in the 1970 negotiations, any particular request by the Union in terms of this negotiation, relating to safety and health?

* * * *

[28] THE WITNESS: May I explain?

Q (By Mr. Howard) Sure.

A At the Local Union meetings, we have the input from the membership who make recommendations in the agreement. That is where we receive the recommendations to change the agreement.

Q And as a staff representative, do you also bring ideas to the Local Union that you have agreed on the national scale for them to consider in their negotiations?

A I try to.

Q And do you remember from either of those sources, whether it was the Local or whether it was from the International, any considerations of the 1970 contract relating to safety?

A I don't recall at that time, no.

Q Would there have been anything in writing that was generated in preparation for these negotiations, to alert you to various factors that either Local Union members, or the International felt was a policy that should be pursued in the negotiations?

A I think I alluded to the fact that that year we didn't have any requests from our safety and health department for any changes to be made at that time; and if there were any changes from the membership, I don't recall, but that is how we receive the changes.

[29] Q Do you know, as we sit here today, whether

there were any changes with regard to the health and safety portions of the contract between 1967 and 1970?

A To my knowledge there was no change.

Q Do you know when the last change had been made to that contract, prior to 1970; that portion of the contract, the health and safety part?

A I think many years. I can only go back to probably the 1964 agreement, and I think it remained the same from the 1964 negotiations, 1967 and 1970.

Q Prior to the 1970 agreement, did you contact your Health and Safety Department in Pittsburg, or did anyone on your behalf contact the Health and Safety Department in Pittsburg to determine whether or not they had any suggestions to augment the contract, to increase the health and safety provisions contained in there?

A I don't believe so.

Q Did you review with the Health and Safety Department in Pittsburg, prior to negotiating the 1970 contract, the provisions that were contained in the local contract?

A I don't believe I did.

Q Prior to 1970, did you receive any training at all in terms of mining safety?

A No I did not.

Q You had never been a miner prior to that, had you?

[30] A No.

Q Did you have anybody that was immediately accessible to you on your staff, that was in your mind an expert on mining safety?

A No.

Q In negotiating the 1970 contract, as we sit here today, do you remember considering any changes at all to the health and safety portion of that local contract?

* * * *

A I may have, but I don't remember. It has been a good many years ago.

Q (By Mr. Howard) I understand that. It is understandable, also.

Your job as staff representative during that period of time encompassed a certain geographic area; is that right?

A Yes.

Q Could you describe for me the bounds of that geographic area?

A In 1967 I was living in Missoula, Montana, and I was servicing the Anaconda Smelter in Anaconda, Montana, and [31] two small fabricating shops in Billings, Montana; the Lucky Friday Mine in Mullan, Idaho; the Sunshine Mine in Kellogg, and I believe that was it.

Q Prior to 1970, were you involved in negotiating any contracts on behalf of the fabricating shops in Billings?

A Yes.

Q These fabricating shops; is that a mechanical fabrication?

A Yes.

Q Of processed material?

A Yes.

Q The Anaconda function, in Anaconda, Montana; what kind of—

A It is a smelter.

Q Prior to 1970, had you been involved in negotiating any aspects of the health and safety for the fabricating shops, in Billings, Montana?

MR. COHEN: I am going to object to the relevancy.

A I don't remember.

Q (By Mr. Howard) Do you know if you had been in contact with the Health and Safety Department back in Pittsburg on behalf of the fabricating shops in Billings?

A Not that I can remember, no.

Q Did the fabricating shops in Billings, did they have a written contract?

[32] A Yes.

Q Did that also contain provisions relating to health and safety?

A I'm sure it did.

Q Did you have someone on your staff, or accessible to you, who you considered an expert in fabricating shop safety?

A No.

Q The functions at Sunshine that the Steelworkers represented, the workers—let me start all over again.

In your representation of the workers at Sunshine, did you represent only miners?

A No.

Q What others?

MR. COHEN: What year?

MR. HOWARD: In 1967.

A. We did not have the clerical unit in 1967.

Q 1970 you had the clerical unit?

A Yes.

Q You also had the mining unit?

A Yes.

Q They were two Local Unions, were they?

A Yes.

Q Any other functions there at Sunshine?

MR. COHEN: How do you mean, any other functions?

[33] Q (By Mr. Howard) Were there any other Locals?

Mr. COHEN: Do you mean job descriptions of the work performance, other than the mining work or office/clerical work?

A Somewhere in 1970 we organized a garnet mine that was part of the Sunshine Mine property, and they were also a part of Local 5089.

Q (By Mr. Howard) That was, again, a mining function?

A Yes, however, it was not a deep mine. It was a dredge operation.

Q When you say dredge operation, that is essentially a surface operation?

A Yes.

Q In the 1970 negotiations, you have indicated you were essentially the spokesman for the Union representation in the meeting with the mining personnel; is that right?

A Yes.

Q Did you also kind of quarterback the presentations of the Union?

A Yes.

Q Do you remember inquiring into the negotiations for the 1970 contracts with the Local Unions, whether or not they had any specific problems or recommendations with regard to health and safety?

MR. COHEN: I am going to object to the form of that [34] question. His testimony has been the Local Union meetings were the source of the rank and file input as to what the objectives would normally be. Your question pre-supposes the opposite.

Q (By Mr. Howard) My question inquires as to whether or not he asked specifically. Did you ask?

A We asked the membership if they had any recommendations and changes for the agreement, not specifically safety.

Q That would have been an inquiry that you made at a Union meeting of the Local Union?

A I or the president of the Local Union.

Q Do you remember being present at any meeting where inquiries were made of the membership as to recommendations that they may have?

A I don't remember. I was usually at all Union meetings, but I don't recall specifically. I would have to go back and check, but I don't recall. I am sure I was there; I feel sure.

Q Mr. Marshall, did you attend—I think you indicated already you attended most of the Union meetings preceding that negotiations?

A Yes.

Q That is just one of your job functions, is to attend those Local meetings?

A Yes, once a month.

[35] Q Prior to May 2 of 1972, do you recall conversations at local meetings for the Sunshine Miners where safety was discussed by the miners?

A I am sure there was discussion at the Union meetings, yes.

Q As a matter of fact, mine safety is one of their primary interests; isn't it? It came up quite often prior to May 2, 1972?

A Well, I wouldn't say it comes up quite often. It is certainly one of the things that is a function of the Local Union, by the Safety Committee giving their reports, yes.

Q Do you recall discussions where miners, individual members of the Union, whe were not on the Committee, would express their concerns from the floor?

A Yes.

Q What sort of procedure was formed within the Local Union, if you know, to handle those comments that were made from the floor?

A Generally, it depends on who the question was directed to. If it was directed to the chairman of the Safety Committee, then he would answer it. If it was directed to the President of the Local Union, he would answer it. If it was directed to me, I would answer it. It depends on the type of question that was asked at that particular time.

[36] Prior to May 2, 1972, were you involved in any discussions with any representative from the International Union concerning setting up a training program for miners at Sunshine, mine safety training?

A I need for you to clarify that, because I am not sure what you mean by training.

Q Well, training is a broad category, and I am talking about it in its broadest form. Did you have any discussions concerning mine safety and the training of

miners in mine safety, with anybody from the International?

A No.

Q You hesitated in answering, because apparently there is something there that was nagging you. Could you tell me what you are thinking?

A When we would have a training session, usually the Bureau of Mines, U. S. Bureau of Mines, or the State Mine Inspector's office would conduct safety first aid training, and that sort of thing. We utilized that as the training for first aid and so on.

Q Do you recall at any time prior to May 2, 1972, having any time period where you sat down and conferred, either you or in conjunction with somebody else in the International Local, consider the adequacy of mine safety at the Sunshine?

A We sat down many times and discussed mine safety, [37] because of the new Metallic and Nonmetallic Mine Safety Act that was enacted in the federal government, and discussed the action of the Bureau of Mines, how they were involved in it.

Q And this was prior to May 2, 1972?

A Yes.

Q When you say you sat down many times and had those kinds of discussions, was there a specific format where you would do that? Was this at a meeting of specific individuals or—

A We had, and I don't recall the dates, it just escapes me, but we did have meetings with the Bureau of Mines, or a meeting with the Bureau of Mines, to discuss their function of how they would operate in the mines of the Coeur d'Alenes.

Q Do you know in what year that was?

A I think it was probably in early 1972, or '71 era, or '70. I just dont recall the exact time.

Q Do you remember ever receiving any advisory bulletins from any state or federal agencies concerning

certain aspects of mine safety, and the proper function of a mine?

A Are you talking about reports?

Q Reports or bulletins.

A We would receive the updated Nonmetallic Mine Safety Act reports, coming from the government, yes. [38] Q When did you first start receiving those?

A I think when the law was enacted.

Q In 1967?

A I think it was enacted in '67, I'm not sure of the date on that; I am really not.

Q Do you remember any other types of correspondence that you would receive, other than these bulletins?

A No.

Q Did you maintain those bulletins in some file in your office?

A No.

Q Did you read them and review them upon receipt?

A Oh, I'm sure I did.

Q But you didn't keep them for future reference or anything like that?

A No.

Q Did you ever make an inquiry of the Health and Safety Department in Pittsburg as to availability of material to educate you on mining safety?

A No.

Q Did the International, through the Health and Safety Department, or any other representatives, ever provide you with any kind of written material on mining safety?

A They could have, but I don't recall.

Q I take it you would not have retained that as a [39] permanent record or reference material or anything like that?

A No.

Q If you were given something, you would have looked at it and thrown it away if you had it at all?

A Probably if I could use it I would use it. If I couldn't, I would just throw it away.

MR. COHEN: You have asked us to produce in connection with the Grimes and Schwartz depositions which you have noted for next week, any materials which went from Pittsburg to the Local Unions directly, or through the staff representative, and we will respond to that request and provide you those materials.

MR. HOWARD: I am just asking him for what recall he may have.

A I just don't recall.

Q (By Mr. Howard) Did the United Steelworkers in 1967 through 1972, anytime during that era, have some aspects of its organization kept up to date on developing technology and mine safety, that you know of?

MR. COHEN: If you know.

A I really don't know. I have no idea.

Q (By Mr. Howard) What did the Health and Safety Department do in Pittsburg, if you know?

A You should ask them. I don't know. They give advice when I would ask them, and you know, is that sort of [40] thing but—set up conferences.

Q I know you had very little contact with them, but who would you contact with the Health and Safety Department in Pittsburg in the 1967-72 era?

A I would go through the subdistrict director and through the director, and to the department head. I wouldn't go directly.

Q So you don't know any of the names of any individuals there?

A Yes.

Q What names are you familiar with?

A In the 1970's and just prior to that, Paul Shrimp was the director. He was in Kellogg upon invitation one time to speak to the Local Union. Adolf Schwartz after that was the director and I met him at the same time that they were in Kellogg.

Q Was that prior to May 2, 1972?

A Yes.

* * * *

[53] Q (By Mr. Howard) I think I have an understanding of what you are telling me, Mr. Marshall. Let us go back for a moment to this type of hypothetical, where we have now developed a union, and elected our officers, and they have appointed the Safety Committee that is identified in the Constitution, which is Exhibit 1.

A Okay.

Q Is that committee, which is identified in Section 10 of Exhibit 1 that you read, the same committee that we referred to as the Joint Committee at Sunshine?

A Yes.

Q There weren't two separate committees here?

A No.

* * * *

[54] Q (By Mr. Howard) If it will help, let me go after it in a different way. The obligation under the Constitution to formulate a Safety and Health Committee, that was satisfied I take it by the Joint, by the formulation of the Joint Safety and Health Committee at Sunshine; is that correct?

A Yes.

MR. COHEN: Union representatives of the Joint Safety and Health Committee.

Q (By Mr. Howard) I just want to make sure that we weren't talking about different committees, that there were two Union committees within the Union, other than the representation on the Joint Committee.

MS. CLARK: Actually, as a theoretical matter, there are two separate committees. They function—the Union members on the Joint Health and Safety Committe are also the Union Health and Safety Committee.

Q (By Mr. Howard) I am not interested in theory at [55] this point. I am interested in what happened in determining those procedures in the 1970-1972 era. They were one and the same, these committees. Let me ask, were the same three people who constituted the Local Union 5089 Safety and Health Committee, if you know, were those same people, the three or four, the Union representatives?

MR. COHEN: On the Joint Safety and Health Committee.

A Yes, they were.

Q (By Mr. Howard) And inspections that they did were done all at the same time?

A Right.

Q They weren't separate inspections where the Union did it on their own behalf, and then they did it on behalf of the Joint Committee?

A No.

Q Now, we have our theoretical Union, hardrock mine union, that we have developed, and we have developed the safety committee, and they are made aware of the Constitution that requires their performance. Do you know of any information by way of guidance that is available from the International department, as to what they should be looking for when they perform these reviews of the underground areas?

MR. COHEN: Time frame?

Q (By Mr. Howard) 1970 to '72 era.

A First of all, the committee itself is appointed by [56] the President of the Local Union. He would look at the membership, because they are miners. These people are hired out as miners, and helpers, and so on in the mine. That is their primary job. Their secondary job, of course, is assisting the union because we are the bargaining agent; okay?

Q Okay.

A Through their knowledge of working in the mine, they know whether an operation is safe or unsafe. They know it better than anybody else, because they work there.

Q Because they are miners?

A That is right, because they work there. They can understand if they are going to have a rock burst, or a problem within the mine. They understand that. So to give them any other training in safety, they are really the experts in and of themselves.

Q I take it then your answer to my question is there were no other forms of guidance provided?

A To my knowledge, that is right.

Q And you relied upon the experience of the people who were already there when you formed this political union that we just formed.

* * * *

[57] Q (By Mr. Howard) The aspect of safety, I take it then from your point of view as a staff representative, is that it is provided by the people who were working on the jobsite?

* * * *

A When an individual in the mine is appointed to the Safety Committee, he is now acting on the committee in behalf of the Local Union. The other tools which he may need are communications, both with management and with the Local Union officers. If there is a problem that he sees, then he has an [58] avenue to go in with the Joint Committee to take care of that. Again, if he has a problem, he will contact the proper people. We, myself, would contact, or the Local Union President, would contact the state and federal mine inspectors to try to remedy the problem that he may see. He sees this safety problem. He has an avenue to take care of it.

That is how we handle the safety problems, and that is how we have handled it.

Q (By Mr. Howard) But in terms of somebody on the Safety Committee recognizing the problem, you are relying on the workers who are locally there at the worksite?

A Yes, they see it.

Q But you are relying on them to recognize these problems?

A Oh yes, absolutely.

Q And I mean there are no inspectors that are provided by the International from home office, that inspect the mines are there?

A No.

* * * *

ORAL DEPOSITION OF ADOLPH SCHWARTZ
TAKEN JULY 12, 1983

* * * *

[46] A Well, at the William Penn Hotel, those began in August of '69, and they dealt primarily with the pending OSHA legislation. We set forth the procedures that we thought they should follow to assist the international officers and directors in securing passage of the Occupational Safety and Health Act.

In addition, the program—I don't know what exhibit it is, that other one.

MR. COHEN: The blue book?

THE WITNESS: Yeah, that one.

A It wasn't even the blue book then. It was just a stapled together document. We went through and explained to them what I had done, as a coordinator for District 29, and what we recommended they do in order to help the folks at the local unions.

Q These seminars or programs at the William Penn Hotel—whatever you want to call them—who was that information provided to?

A The coordinators.

Q The safety coordinators for the districts and subdistricts?

A Right.

Q In the Coeur d'Alene mining district—

[60] Q Do you know who the author was of Exhibit No. 1?

A I was.

* * * *

[82] Q Under Article XIV, on Page 37, let me direct your attention to that article. Does that bylaw require anything of the local union?

A Say that again, please.

Q Does that bylaw that I'm directing your attention to require anything of the local union?

A Yeah. It's a bylaw of a local union.

Q What does it require the local union to do with regard to safety?

MR. COHEN: Under Section 1 it states, "A Workmen's Compensation Committee and a Safety and Health Committee, under the direction of the International Union or its designated representative, shall be established in the local union."

THE WITNESS: The end of Section 1.

* * * *

[84] Q My questions are relating to the connection between the bylaws and the section that you just read and the connection, if any, with the recommendations that are in Exhibit No. 1.

[85] As I read the bylaws, the local safety and health committees are formed under the direction of the international, and I'm wondering—

A Or its designated representative.

* * * *

Q And is that recommended procedure something that you directed to the local unions?

A Well, first of all, I think we should understand that we in the Safety and Health Department do not exercise direction, and you're formulating the question—direction comes from the international officers and the International Executive Board.

We recommend; we suggest. We put together a program [86] like that. We explain it time and time again. But the Safety and Health Department does not have the authority to recommend—or direct anybody and say this is what you have to do.

Q All right.

A That's not our prerogative. I believe it comes under the direction of the international president and the board and our convention action.

Q Do you know if any of the officers of the international ever supplied any direction to the local unions that they adopt your recommended safety and health program, which is Exhibit No. 1?

* * * *

[87] A The president—the best I can do in that respect, President Abel's remarks at our first and second safety and health conferences are there, and they're recorded verbatim, and I haven't—

Q Are they in one of these exhibits?

• • • •

A Both of them are here.

• • • •

Q Mr. Schwartz, we've had marked now as Exhibit No. 7 a document which consists of a number of different pages.

[88] Would you identify that for the record.

A Okay. This is a statement by President I. W. Abel of the United Steelworkers of America that was made at our first International Safety and Health Conference in November of 1969.

In addition thereto, there's also a statement by Marco Vestich to the conference. There is also a statement by Mr. Ben Fischer, director of the contract administration department, United Steelworkers of America, a rather wordy gentleman.

A statement by Thomas F. Mancuso, M.D., from the University of Pittsburgh, to the conference. A statement by Dr. Hawey A. Wells, Professor of Pathology, University of West Virginia.

• • • •

[89] Q Mr. Schwartz, let me show you what has been marked as Exhibit No. 8, and that's a single document consisting of a number of pages. What is that?

A These are speeches, statements, whatever you want to call them, by all of the people set forth in the index.

Q All right. And those statements apparently were made at your international—

A Second International Safety and Health Conference in May of '71, it's marked Exhibit 8.

Q Exhibit No. 7, the series of documents that you identified in Exhibit No. 7, are those a summary of the

statements made by the individuals indentified or a verbatim transcript?

A They're verbatim transcripts.

Q And when were those statements made? Do you know?

A In Exihbit 7?

Q Yes.

A They were made in November of 1969, at our first [90] safety and health conference in Chicago.

Q Now, these are the two documents that you were referring to earlier when we were talking about whether or not President Abel ever directed the locals to adopt the recommended procedures or program. That's marked as Exhibit No. 1; is that correct?

A That's correct.

Q Other than these two documents, do you know of any other comments made by President Abel with regard to safety—or excuse me, with regard to adopting your recommended program?

A Not as it deals with the recommended program, Mr.—President Abel did much in testimony in Washington to secure passage of the Occupational Safety and Health Act.

All that, but not as concerns adopting the program set forth in Exhibits 1 and 2. To the best of my knowledge, whatever is in there is in there, but I haven't looked at it for some time.

• • • •

[91] Q In your interpretation of the bylaws and the constitution of your union, who had the authority to direct the local unions with regard to their safety and health committees?

• • • •

A Well, certainly, we don't have the authority to direct our district directors or the people out in the field. [92] That comes—that's formulated through the officers, through the International Executive Board, which is com-

posed of the district director and at that time through three top international officers.

• • • •

Q My question was who, if anybody, did have the authority to direct the local unions with regard to safety, pursuant to the bylaws that you have before you there?

A Well, keeping in mind what Mr. Cohen just said, I would respond in this fashion: That President Abel did and the district directors in the various districts did.

• • • •

EXHIBIT NO. 1 TO SCHWARTZ DEPOSITION

RECOMMENDED SAFETY AND HEALTH PROGRAM

UNITED STEELWORKERS OF AMERICA

• • •

AFL-CIO-CLC

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International Safety and Health Department

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OBJECTIVES

The International Safety and Health Department sets forth two objectives in this document:

First, it recommends contractual language to be negotiated into all of the contracts under the jurisdiction of the United Steelworkers of America. Second, the Departments states the objective of the International Safety and Health Department is to set forth the reasons why the contractual recommendations are made. The Department will provide advice and counsel to Local Union negotiating committees when they are faced with negotiating the recommended Safety and Health Program into their agreements.

This recommended program is a comprehensive one. It is designed so it can be applied, workably, to the largest and to the smallest Local Unions of the USWA.

There are approximately 3,600 Local Unions in the United Steelworkers of America. There are some amalgamated Local Unions which have more than one contract under their jurisdiction.

The jurisdiction of the USWA includes such industries as basic steel, can, aluminum, fabrication, warehouses, mining, ships on the Great Lakes, etc.

The USWA includes members in the United States, Canada, Hawaii, Puerto Rico and the Virgin Islands.

Therefore, the job of preparing a standard Safety and Health Program to be adopted where appropriate is a formidable one. It is the judgment of the Department that the recommended program can be *tailored* to the needs of any Local Union.

There are some excellent Safety and Health Programs already in existence in some of our Local Unions. However, too many of our contracts are inadequate in the areas of safety and health.

Some of the features of the recommended Safety and Health Program may already be in your contracts. Take the parts of the program that best suit your needs or take all of it. This comprehensive program will do the job of protecting the safety and health of our membership.

The first section of the Safety and Health Program is recommended contractual language, designated with an "L". The section immediately following it states the reasons for the recommended contractual language, designated by the letter "R".

SECTION 1—(L)

OBJECTIVE AND OBLIGATIONS OF THE PARTIES

The Company and the Union shall cooperate in the continuing objective to eliminate accidents and health hazards. The Company shall make provisions for the safety and health of its employees during the hours of their employment.

SECTION 1—(R)

It is most important that the Industrial Safety and Health Program be a *joint* program, where the responsibilities and obligations of the parties are equally shared. In the event either party assumes more than half of the obligations, the entire program becomes unbalanced and most certainly will not function. This is why we stress under "Objective and Obligations of the Parties" that both the Union and the Company cooperate in the continuing obligation to eliminate accidents and health hazards.

SECTION 2-A—(L)—1200 OR MORE

JOINT UNION-COMPANY SAFETY AND HEALTH COMMITTEE

The Company and Union shall establish a Joint Safety and Health Committee. The union members should be the Union Safety Committee Chairman, and an agreed number of safety committeemen. The Company shall have an equal number of management representatives.

The Company shall notify the Union by letter of the designated representatives of the Company's Safety and Health Committee.

The Union shall notify the Company by letter of the designated representatives of the Union's Safety and Health Committee. The Union Committee will cooperate with Management to develop a Safety and Health Program, designed to prevent accidents and health hazards.

The Union Safety Chairman or any member of the Safety Committee will have access to all areas within the jurisdiction of the Local Union at any time of the day or night after proper notification to the Plant Protection Patrolman, at the area he is entering.

Members of the Union Safety Committee shall be afforded time off to transact any legitimate matters pertaining to safety, such as accident investigations, meetings, etc., after proper notice to his supervisor.

SECTION 2-A—(R)—1200 OR MORE

The International Safety and Health Department is recommending three types of Local Union Safety and Health Committees which will best serve the needs of our membership. First, the Safety Department will address itself to Section 2-A and to Local Unions with a membership of 1,200 or more.

The Committee Chairman should serve on a full-time basis, responsible only to the President of the Local Union, and his wages shall be paid by the Company. It shall be the function of the Chairman to see that all of the features of the Safety and Health Program are adhered to by our members and the Company.

It is necessary that access to company property during any hour of the day or night is readily available to the Safety Chairman, and to the Local Union Safety Committeemen. This must be by contractual right. It is recommended that the Safety and Health Program be separated from the grievance procedure.

It is recommended that all members at all levels of the Local Union Committee be appointed by and work directly under the President of a Local Union.

In Local Unions where the past practice has been to elect all members of the Safety and Health Committee, no change is recomended.

The wages for the Union Safety Chairman should be negotiated between the Local Union and the respective company.

It shall be the responsibility of the Chairman of the Committee to notify their district safety coordinator and the International Union Safety and Health Department of the names, addresses and telephone numbers of the members of the Local Union Safety and Health Committee.

SECTION 2-B—(L)

UNION SAFETY COMMITTEE—Unions with 200 to 1200 members

There shall be an agreed number of Safety and Health Committeemen from the bargaining unit, one of whom shall serve as Chairman. There shall be an agreed

number of Committee members representing the Company. The Committeemen for the union and the Company may be expanded by mutual agreement.

SECTION 2-B—(R)—200 TO 1200 MEMBERS

It is recommended that Committee members come from various areas in the plant, and that they represent both production and maintenance employees.

It is recommended that the Union Safety Chairman be permitted to work the turn or shift which makes him most available to his membership. It is recommended that the Union Safety Committee be divorced from the grievance committee.

It shall be the responsibility of the Committee Chairman to notify the respective district safety and health coordinator and the International Union Safety and Health Department of the names, addresses and telephone numbers of the Local Union Safety Committee.

SECTION 2-C—(L)

SMALL PLANTS—Unions with 200 or less members

There shall be an agreed number of Safety and Health Committee members who may be officers of the Local Union, one of whom shall serve as Chairman. There shall be an agreed number of Safety and Health Committee members who shall be representatives of management. The Committee may be expanded, both Management and Union, by mutual agreement.

SECTION 2-C—(R)

It is recommended in small plants that officers and members of the Local Union's Executive Board may also act as members of the Committee, if others are unavailable. (Experience has taught us that in small plants it is often difficult to get anybody except the Local Union Officers to participate in the affairs of the Local Union.)

SECTION 3—(L)

JOINT UNION-COMPANY SAFETY AND HEALTH COMMITTEE MEETINGS

The Joint Safety and Health Committee shall meet regularly and take up such safety and health complaints as may be brought forth by either the union or the company safety committees. Each committee shall advise the other committee sufficiently in advance of the meeting what items it wishes to discuss.

SECTION 3—(R)

It is strongly urged that all union and company safety and health committee meetings be held on a weekly basis. These should be regularly scheduled meetings. There should be no postponements or discontinuance of these weekly meetings unless other meetings of the utmost concern to the parties warrant it. These weekly meetings are the beginning of the establishment of line of communication between the union and the company that must be maintained at all times.

Advance information on the agenda will prevent the company from claiming it is not prepared to discuss items on the agenda, and will prevent the company from asking for more time before it considers a particular item.

We do not mean to imply that something of an urgent nature cannot be taken up in these meetings without prior notification. As much as possible, a prepared agenda should be exchanged by the parties at an appropriate time prior to these regularly scheduled weekly meetings of the joint company and union committees.

SECTION 4—(L)

SPECIAL SAFETY MEETINGS

Special safety meetings may be requested by the Company Safety Director or the Union Safety Chairman. Such meetings shall be held at a mutually satisfactory time.

SECTION 4—(R)

No matter how many sections are written in any particular safety and health article, no matter how many people are involved in the administration of the safety and health program, situations arise from time to time that require immediate consideration, and action. Therefore, all local unions must have a provision for special safety meetings.

SECTION 5—(L)

BOARD OF INQUIRY

A Board of Inquiry consisting of the Company Safety Director and two (2) other representatives designated by the company, together with the Union Safety Chairman, and two other representatives designated by the Union shall be convened and shall investigate all accidents involving fatalities, disabling injuries, extended loss of time by an employee or such other serious situation as merits investigation in the opinion of the company or the union.

The Board of Inquiry shall make on-the-spot investigations, hear witnesses and examine records as required in the opinion of the company or union to determine the causes of the accident and any remedial or preventive action.

The Board of Inquiry shall be held as soon as possible, but not later than three (3) days after the incident or accident occurs.

SECTION 5—(R)

When an accident does occur, it should be investigated as set forth in this Section, and the objective of the investigation should be to prevent the recurrence of similar accidents.

The minutes of the Board of Inquiry meetings shall be submitted to the Joint Safety Committee for review.

SECTION 6—(L)

QUARTERLY REVIEW

The Union Safety Committee will meet jointly with the Company Safety Committee every three (3) months. The purpose of this meeting will be to review and evaluate all aspects of the safety program in conformity with the agenda agreed by the members of the Joint Committee. The agenda should include the Plant Inspection Reports. (see Section 8)

SECTION 6—(R)

The purpose of the Agenda is to insure that all of the provisions of the Safety and Health Program will be thoroughly reviewed every three (3) months.

The suggested Agenda should include the following:

QUARTERLY REVIEW—Suggested Agenda

SUBJECT

BOARD OF INQUIRY REPORTS
FIRST AID CASES
NATURE OF LOST TIME INJURIES
TYPES OF ACCIDENTS
CLASSIFICATION OF INJURIES
SAFETY STATISTICS
LOST TIME INJURY BOARDS
SAFETY RECOMMENDATIONS
HOUSEKEEPING SUMMARY
NOISE EXPOSURES
UNSAFE CONDITIONS SUMMARY
TEMPORARY WIRING
LIGHTING
SANITARY FACILITIES
RESTAURANTS
CRANE INSPECTION
RAILROAD VEHICLES
RUBBER WHEELED VEHICLES
IN PLANT AIR POLLUTION

TRACKED VEHICLES (Bulldozers, etc.)
SAFETY TALK CONTACTS
UNSAFE PRACTICES
HOLD CARDS
RESPIRATORY EQUIPMENT
FIRE EQUIPMENT
EMERGENCY INJURY EQUIPMENT
PERSONAL PROTECTIVE EQUIPMENT
NEW EQUIPMENT AND PROCESSES
HEAT AND VENTILATION
AIR AND WATER POLLUTION
WARNING DEVICES
SPEED CONTROL
X-RAY PROTECTION
FIRST AID STATIONS
USAGE OF CHEMICALS
GASES, ETC.
MUTUAL COOPERATION
GENERAL DISCUSSION

SECTION 7—(L)

MINUTES OF SAFETY MEETING

Minutes of all Safety and Health meetings between the Company and the Union shall be prepared by the Company.

Copies of the minutes shall be mailed to the Staff Representative, Local Union President and Union Safety Chairman within ten (10) days (excluding Saturdays, Sundays and holidays) after the date on which the meeting was held.

If the Union Safety Chairman shall disagree with the accuracy of the minutes as prepared by the Company, he shall set forth his reasons for such disagreement in a letter to the Company, and the minutes except for said disagreement shall be regarded as satisfactory.

Minutes shall conform to the following outline:

(1) Date and place of meeting.

(2) Names and positions of those present.

(3) Description of each Safety and Health subject discussed.

(4) Statement of Union position.

(5) Statement of Company position.

(6) Summary of discussion.

(7) Decision reached, if any.

SECTION 7—(R)

All minutes of all meetings relating to safety and health are a wonderful source of information for all local unions immediately prior to the commencement of negotiations. Particular problems in your local union will clearly be reflected in the minutes, and there will be justification for changes in the Safety and Health Program where needed.

SECTION 8—(L)

PLANT INSPECTIONS

The Joint Safety and Health Committee shall regularly inspect the plant to observe the housekeeping in the plant, and to observe unsafe conditions or practices in the following areas:

1. Temporary Wiring
2. Plant Lighting
3. Sanitary Facilities (Toilets, Showers, Wash Rooms, Locker Rooms, etc.)
4. Restaurants and Lunch Rooms
5. Overhead Cranes
6. Railroad Vehicles—Engines—Cars—Cranes
7. Rubber Wheeled Vehicles—Trucks—Hi-Lows, etc.
8. Tracked Vehicles—Bulldozers—Crawler Cranes
9. Hold Cords—Ask employees, while on inspection

10. Respiratory Equipment
11. Fine Equipment
12. Emergency Injury Equipment—Ambulance, Stretchers, Blankets, etc.
13. Personal Protective Equipment—Hard Hats, Safety Glasses, Shoes, Wristlets, etc. Hot Metal areas, Acid areas, etc.
14. Heating and Ventilation
15. Air and Water Pollution
16. Warning Devices—Bells, Whistles—Horns—Flooding Lights, etc.
17. Speed Control—Larger Plants—Outside Contractors—Salesmen—Trucks
18. X-Ray Badges—Check employees working in exposure areas.
19. First Aid Stations—Check them for proper equipment and medication
20. Usage of Chemicals—Solvents—Compounds—Excessive Dust—Fumes—Gas
21. Check all tools and equipment our members are using in the performance of their job duties—through the plant.

A written report of the inspections by the Joint Safety and Health Committee shall be compiled, special attention shall be given to repeat items, and one copy of the report is to be furnished to the Safety Committee, Staff Representative, and District Coordinator.

SECTION 8—(R)

The features of Section 8, Plant Inspection, cannot be over-emphasized. It is suggested that after Section 8 has been complied with, then the features of Section 3 be complied with. In this way, the views of the Joint Safety Committee will be in writing, and made a part of the minutes. The value of plant inspection is that the com-

pany cannot say it did not know that certain conditions existed. By having a joint committee and by making a joint plant inspection, it will be easy to determine whether the items observed, by either party, falls within the jurisdiction of the Safety and Health Program.

SECTION 9—(L)

SAFETY AND HEALTH RECOMMENDATIONS

Safety recommendations of the Union Safety Committee, submitted by the Chairman, shall be reduced to writing on forms provided by the company, or the International Union—Form #263, and filed in duplicate with the Company's Safety Director who shall number the recommendation and note thereon the date it was received. A copy of the recommendation shall be sent to the President of the Local Union. The safety recommendation shall be reviewed by the Union Safety Chairman and the Company Safety Director at the time the recommendation is filed.

The Company Safety Director will answer and code the safety recommendation as promptly as possible; but, not later than seven (7) days, excluding Saturdays, Sundays and holidays, from the date of filing. Copies of such answer will be furnished to the Union Safety Chairman, the President of the Local Union and the Staff Representative of the International Union.

If the recommendation is granted, the company will endorse a tentative completion date on the recommendation. Upon the completion of the recommendation, a notice will be furnished to the Union Safety Chairman, the President of the Local Union and the Staff Representative. If the recommendation is denied by the Company, it may be made the subject of a grievance and processed under Section 18 (L).

SECTION 9—(R)

The International Form #263 is for the filing of Safety and Health recommendations with the company.

This is not to suggest that all other steps or features of the safety program should not be utilized to the fullest. However, from time to time it becomes necessary to reduce to writing a safety recommendation, after various other parts of the Safety and Health Program have failed to produce the desired results. The filing of Form #263, to a degree, is a counterpart to a grievance in that it sets forth the recommended corrective action.

This form should be graded, using an agreed method, and then should be kept active until the union safety committee is notified that the recommended corrective action has been completed.

The provisions of this section should be utilized between periodic meetings of the Joint Committee.

In the event there is disagreement between the union and the company safety committee as to the merit of the safety recommendation on Form #263, the special meeting referred to in Section 4 should be utilized.

In any event, with the filing of a safety recommendation on Form #263, the company will be on notice that an unsafe condition or a hazard exists, and if they truly believe in the provisions of Section 1, they will correct the unsafe condition or hazard. If a company denies a valid safety recommendation it knows it runs the risk of a fatal or a serious accident resulting from such a denial.

SECTION 10—(L)

PROTECTIVE DEVICES, WEARING APPAREL, —EQUIPMENT, HEAT AND VENTILATION

Protective devices, wearing apparel and other equipment necessary to properly protect employees from injury shall be provided by the Company in accordance with practices now prevailing.

Protective devices, wearing apparel and equipment shall be mutually agreed upon and listed in a safety book, and shall be revised and brought up-to-date twice

each year by the parties. The Company shall make reasonable provisions for the proper cleaning and maintenance of all safety equipment.

Proper heating and ventilating systems shall be installed and maintained.

SECTION 10—(R)

Protective devices, wearing apparel and other safety equipment necessary to the job should be listed in a safety book and up-dated periodically.

SECTION 11—(L)

NEW APPAREL

When the company introduces new personal protective apparel, or extends the use of protective apparel to new areas, or issues new rules relating to the use of protective apparel, the matter will be discussed with the members of the Safety Committee in advance, with the objective of increased cooperation.

SECTION 11—(R)

In these days of constant changing technology, new apparel is introduced often. Therefore, union safety committee members should be involved constantly in the checking of new apparel, to see that it best serves the needs of our members.

When new protective devices or wearing apparel is introduced by the company, it should be set forth in the safety book referred to in Section 10.

SECTION 12—(L)

NEW WORK PROCESSES

The company shall notify the Chairman of the Union Safety Committee prior to the time new machinery or new work processes are put into use to help protect the safety and health of the employees.

Compliance with this Section is to insure maximum cooperation in the prevention of accidents. The objective is

not to obtain the approval of the union to put the changes into effect.

SECTION 12—(R)

Due to constant changes in technology, new work processes are almost a daily occurrence in most of our plants, large or small; therefore, it is of utmost importance that when new work processes are introduced by the company, the union safety committee be made aware of such new work processes so that they investigate them, check them, and make a determination as it relates to safety and health, seeing to it that the best interest of our membership is protected.

SECTION 13—(L)

CHEMICALS, SOLVENTS AND COMPOUNDS

Where the company is currently using chemicals, solvents and compounds or when new chemicals, solvents or compounds, etc. are to be introduced, the Company shall inform the Safety Chairman what hazards, if any, are involved and what precautions are taken to insure the safety and health of the employees. The company shall supply documentary evidence to this effect.

SECTION 13—(R)

Since the turn of the century more than 500,000 new chemicals, solvents and compounds have been introduced in industry. The ravages relating to health that some of these chemicals, solvents and compounds have caused is just beginning to be recognized and felt by employees.

Usually the effects from chemicals, solvents and compounds have a fairly long range effect. Sometimes, from 10 to 15 years. In some cases, once the employee becomes ill from some of the chemicals, solvents and compounds, there is nothing that can be done to save his life.

On June 4th and 5th, 1969, in Washington, D.C., at the first Industrial Union Department Safety and Health Conference, highly qualified members of the medical profession set forth terrifying examples of what happened to

people in industry who work with asbestos, coal, beryllium and teflon, etc., and, in all cases, once the cause of illness was discovered, it was too late to do anything for the people who had contacted these industrial diseases.

Every effort should be made to negotiate sound, practical, workable language which guarantees our members the fullest protection against any possible effects from chemicals, solvents and compounds. Smaller companies which may not have laboratories can utilize the services of federal, state, county or city services.

SECTION 14—(L)

GOVERNMENT REPORTS

In the event the federal, state, county or city government conducts an inspection or a test in a plant, either routine or at the request of the union or an individual member or the company, the results of such an inspection or test shall be made known to the Local Union and to the International Union in the same form as is furnished to the company by the federal, state, county or city government.

SECTION 14—(R)

It is commonplace in most states that various inspectors inspect industrial plants. The arrival of the inspector at the plant, the inspection conducted, and the results determined are not made known to the Union's Safety and Health Committee. It must be clearly set forth in the contract that these reports from the various governmental agencies must be furnished to the Union.

The cloak of secrecy must be removed from this area of government inspections. If the inspections reveal nothing detrimental to the safety and health of our members, then this should be made known. If the inspections reveal something that is detrimental to the safety or health of our members, then this, too, should be made known.

SECTION 15—(L)

SAFETY TALK PROGRAM

A Safety Talk Program shall be established which shall provide at least one (1) safety talk to the employees per week. This program is to be administered by the Company through the foremen or other safety representatives of the company. In addition, all new employees hired by the Company shall be given an orientation on the Safety and Health Program.

SECTION 15—(R)

The Safety Talk Program is a method of communication between the employee and his immediate supervisor on matters relating to safety and health.

We have already stressed the importance of communication relating to safety and health. It is suggested that one-half of the safety talk deal with general items relating to Industrial Safety and Health. The second half of the talk shall deal with the employee; his job, his department, and/or immediate work area.

The minutes of Board of Inquiry Meetings (Refer to Section 5) are an excellent source of material for safety talks.

It is strongly urged that all new employees be thoroughly indoctrinated in the area of Safety and Health before they begin work, so that they will not cause injury to themselves or their fellow workers.

SECTION 16—(L)

FIRST AID REPORTS AND AMBULANCE CALLS

The company will provide the union safety chairman with daily copies of first aid reports involving bargaining unit employees.

The company will notify the union safety chairman, and/or the appropriate union safety committeeman of ambulance calls involving bargaining unit employees of the company.

SECTION 16—(R)

The furnishing of first aid reports on a daily basis will enable the safety chairman to keep a running check on all types of injuries, and help him determine whether they warrant a Board of Inquiry investigation.

It will also enable the union safety chairman to see where particular injuries are taking place, and help him in the prevention of future accidents.

Notification of all ambulance calls will enable the Union Safety Chairman to get to the scene of an accident very quickly.

This is extremely important to a Board of Inquiry investigation because it will enable the safety chairman to observe the scene before anything has been disturbed.

SECTION 17—(L)

SAFETY COMPLAINTS AND DISPUTES

It is the intent of the parties that no employee shall be required to work under conditions which are unsafe or unhealthy beyond the normal hazard inherent in the operation in question, and that an employee who believes that he is being so required shall have the right to:

(1) Relief from the job without loss to his right to return to such job and at the Company's discretion, assignment to any other job at the rate of that job as may be available in the plant; provided, however, that no employee other than communicating the facts relating to the safety of the job, shall take any steps to prevent another employee from working on the job; or

(2) File a grievance in the third step of the grievance procedure and such grievance shall be given preferred attention; or

(3) a. Discuss it with his foreman in an attempt to settle the problem or complaint.

b. If such complaint or problem is not settled as the result of such discussion, a member of the union safety committee will be promptly notified by the foreman. The safety committeeman, the employee and the foreman will then discuss such complaint or problem in an attempt to resolve the matter.

c. If such complaint or problem is not settled as the result of such discussion it will be the responsibility of the foreman to notify the Company Safety Director and the Union Safety Chairman immediately.

d. The Company Safety Director and the Union Safety Chairman shall meet immediately with the involved parties to determine whether the employee was being required to work under conditions which were unsafe or unhealthy beyond the normal hazard inherent in the operation in question.

e. In the event the complaint or problem is not resolved as the result of such discussion, then the matter shall be promptly referred to the Board as constituted in the following sub-paragraph:

f. There shall be a Board consisting of six (6) members. The representatives of the Company shall be ----------. The representatives of the Union shall be the Staff Representative, the President of the Local Union and the Safety Chairman. The Board shall meet as soon as

possible to determine whether the employee was being required to work under conditions which were unsafe or unhealthy beyond the normal hazard inherent in the operation in question.

g. If the Board is unable to agree, then the matter shall be referred to immediate arbitration.

SECTION 18—(L)

SAFETY GRIEVANCES

Safety grievances shall be processed directly to the third step of the grievance procedure, and will be subject to arbitration. Such third step grievance meetings shall be attended by the Company Safety Director and/or his representatives, and designated representatives of Management, the President of the Local Union, the Chairman of the Grievance Committee, the Union Safety Chairman, a member of the Safety Committee, and Staff Representative of the International Union.

SECTION 18—(R)

This Section has already been referred to in other provisions for the filing of safety grievances, and it sets forth the procedure. This Section 18 should not be used as a crutch. All other featuures of the program should be utilized before a safety grievance is written.

In the event it is determined by the union's safety committee to utilize the grievance procedure, then it should be done; however, do not use this section to circumvent, in any manner, any of the provisions of this total safety program.

SECTION 19—(L)

UNION SAFETY CHAIRMAN GRIEVANCE RIGHTS

Notwithstanding the rights of the employee stated above, the Union Safety Chairman and/or the safety

committeeman shall have the right to utilize the grievance procedure as described above whenever, in their opinion, unsafe or unhealthy conditions exist, and the employee or employees involved do not file a grievance.

SECTION 19—(R)

The purpose of this Section is to give to the Union Safety Chairman a tool or a procedure which he can utilize in the event our members do not utilize the provisions of the safety and health program.

Therefore, it is the responsibility of the Union Safety and Health Chairman to see that complacency does not set in, and that we will not have to re-live the safety and health history of by-gone years.

SECTION 20—(L)

SAFETY EDUCATION AND TRAINING

The Company and the Union shall establish and maintain a sound, practical and workable Safety Education Training Program.

The Safety Education Training Program shall cover two (2) primary areas, and shall be governed by acceptable Safety methods and procedures.

The first area will provide for Safety Education and Training in general; programs such as Hard Hats, Eye Protection, Safety Shoes, Fire Prevention, etc.

The second area will provide for individual Safety Training of the employee. His job, his responsibilities, safety-wise, to himself and others, the equipment, tools and material he uses, Chemicals, Solvents, and Compounds, etc.

SECTION 20—(R)

To succeed, a Safety Education and Training Program must be understood and accepted by the people involved. They must understand that all of this effort is for their protection and welfare as well as their families; and, for the protection and welfare of their fellow workers and their families.

SECTION 21—(L)

PERMISSIBLE NOISE EXPOSURES

No employee shall be subject to sound levels exceeding the limits set out in Paragraph 50-20410 of the Safety and Health Standards for Federal Supply Contracts under the Walsh-Healey Act, or the Standards of any subsequent Federal State or Local Acts or Laws whichever are higher.

SECTION 21—(R)

It is recommended by the Department that all who are responsible for negotiating contracts, and all who are responsible for implementing and maintaining the Safety and Health Program in the Local Unions, make themselves thoroughly familiar with the provisions of Federal Register—Volume 34—Number 96—Tuesday, May 20, 1969, Washington, D. C.—Part II—Department of Labor—Safety and Health Standards (Walsh-Healey Standards), so they will be well equipped for the job and battle ahead, with the Companies, to secure the referred to standards.

SECTION 22—(L)

WORKING ALONE

No employee shall be required to work alone in any area beyond the observation of other persons.

SECTION 22—(R)

Recent fatal accidents sharply point out the need for the above section. In recent fatal accidents the investigation conducted to determine cause, to prevent re-occurrence, failed. The reason the investigation failed was, no witnesses; therefore, no statements or observations from witnesses, net result—nothing—except a dead Union Brother, and a grieving family and a saddened Local Union.

Had the above section been in the Contract and enforced by all Union personnel who are responsible for the maintenance of the Local Union's Safety and Health program the fatal accidents may have been avoided.

CONCLUSION

The Safety and Health Program as outlined, is comprehensive. It is *not* suggested that the exact language of the outline must be negotiated into each contract because of the differences in various manufacturing processes and the size of local unions.

It is recommended that prior to negotiations, all of the proposed sections and their explanations be carefully gone over to determine what best suits the individual needs of the members so that the best possible safety and health program can be provided.

After the drafting of a Safety and Health Program, and the presentation to the Company, it should be examined to see if it meets all requirements to handle all safety and health problems. This is the test that an effective and practical Safety and Health Program must meet.

IT MUST DO THE JOB

EXHIBIT NO. 2 TO SCHWARTZ DEPOSITION

USWA

SAFETY and HEALTH PROGRAM

ACCIDENT INVESTIGATION
MEETINGS AND REPORTS
JOBSITE INSPECTION
FIRST AID FACILITIES
GOVERNMENT INSPECTIONS
EDUCATON AND TRAINING
MANAGEMENT RESPONSIBILITY
UNION PARTICIPATION
ORGANIZATION

INTERNATIONAL SAFETY & HEALTH
DEPARTMENT
United Steelworkers of America
AFL-CIO-CLC

FOREWORD

This pamphlet on safety and health is one of the most important pamphlets ever published by our Union because nothing is of more concern to our Union than the safety and health of our members.

The United Steelworkers of America has pioneered in the field of occupational safety and health. In the United States, it played the leading role, for example, in winning Congressional approval in 1970 of the Occupational Health and Safety Act.

But the struggle against injury and death on the job involves more than the printing of pamphlets and the passage of legislation. It involves a sense of determination of all concerned to see that safety programs and legislation are effectively implemented.

Health and safety programs are going to be made or broken at the plant level, by how well our local unions and their safety and health committees do their job, and by the involvement of our individual members.

Also, the occupational health and safety laws in our two nations must be administered with zeal and a genuine concern to reduce death, injury and illness at the work place. This is in the highest national interest and our Union will insist upon that kind of administration of such laws, supported by adequate funding and staffing.

Let us all, then, pledge our energies to implementing not only the program outlined in this pamphlet but to fulfilling our responsibilities under the law so that our members will enjoy the safest and healthiest working conditions possible.

I. W. Abel,
International President

PURPOSE

Our Union, the United Steelworkers of America, has no greater responsibility than to protect the lives, limbs, and faculties of our membership from industrial accidents and from industrial diseases in the work place; to this responsibility, your Safety and Health Department dedicates itself.

This booklet originally titled "Recommended Safety and Health Program," has been revised to provide more definite recommended language for the Safety and Health provision in our agreements.

Since President Abel reorganized the Safety and Health Department in June, 1969, much experience has been gained by the Department. This was achieved through exposure to our membership at our International Safety and Health Conference, at District Conferences, at District and Sub-District Safety and Health Conferences, at Industry Conferences, and by going out into the field, as necessary, to assist local unions with special problems.

There are some excellent Safety and Health Programs already in existence in some of our local unions. However, too many of our contracts are inadequate in areas of safety and health.

Some of the features of the revised language in this booklet may already be in your contracts. Take the parts of the Program that best suits your needs, or take all of it. This comprehensive Program will do the job of protecting the safety and health of our membership.

It is the judgment of the Department that this revised Program can be tailored to the needs of any of our local unions.

Paul Schremp, *Director*
Adolph Schwartz
Marco Vestich
Francis Grimes

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SAFETY AND HEALTH CONTRACT LANGUAGE

The Safety and Health Program outlined here, is comprehensive. It is not suggested that the exact language of the outline must be negotiated into each contract because of the differences in various manufacturing processes, different safety and health problems, and present language.

It is recommended that prior to negotiations, the Safety Committee go over all accident reports and Safety Committee meeting minutes in order to find out what changes are needed.

In this way the Negotiating Committee can determine what best suits the individual needs of the members so that the best possible Safety and Health Program can be provided.

This is the test that an effective and practical Safety and Health Program must meet. The job will not be an easy one, but it must be done.

SECTION 1

OBJECTIVES AND OBLIGATIONS OF THE PARTIES

The Company and the Union will cooperate in the continuing objective to eliminate accident and health hazards.

The Company shall provide a place of employment at each of the plants, that is free of physical and health hazards.

SECTION 2

JOINT UNION-MANAGEMENT SAFETY AND HEALTH COMMITTEE

The Union and the Company shall establish a Joint Safety and Health Committee.

The Union Safety and Health Committee shall be appointed by the Union, and be procedurally structured and staffed in a manner equivalent to the Union Grievance Committee.

The Union and Company shall certify to each other, in writing, their Safety and Health Representatives, and their titles.

The Union Co-Chairman, or an area, zone, or divisional Committeeman shall have access to all areas within the jurisdiction of the Local Union at any time of the day or night, after proper notification to the Plant Protection Patrolman at the area he is entering.

Union Safety Representatives shall be afforded such time off as is necessary to transact legitimate Safety and Health matters; such as, but not limited to, accident investigation, Safety and Health meetings, plant inspections, complaints, etc., after proper notification to their supervisors.

While Union Representatives are on legitimate matters of Safety and Health they shall suffer no loss of wages.

The Union Co-Chairman of the Committee shall be fully paid by the Company.

SECTION 3

PLANT INSPECTIONS

At least once each month an inspection of Safety and Health conditions shall be made in each plant.

The Union and Company Safety Representatives who shall make the plant inspection shall be designated by the Union and Company Co-Chairmen of the Committee.

The purpose of the plant inspection shall be to observe such things as, but not confined to:

Industrial Sanitation and Personal Facilities

Housekeeping

Plant Lighting

Switch Lock-Out Procedures

Respiratory Equipment

Fire Equipment

Emergency Injury Equipment—ambulance-stretchers-blankets-etc.

Heating, Ventilating and Air Conditioning Systems

In-Plant Air and Water Pollution

First Aid Stations

The usage of Chemicals, Solvents, and Compounds

Tools and equipment being used by the employees in the performance of their duties.

At the conclusion of the inspection a written report shall be prepared by the Company. The report shall include recommendations, by either Union or Company representatives making the investigation, for corrections of conditions found to be Safety and Health hazards. Tentative completion dates shall be set forth on the report.

Copies of the report shall be furnished to the Staff Representative who services the Local Union, and to designated representatives of the Union Committee.

In the event a dispute develops as to housekeeping conditions, unsafe work practices, or unsafe conditions, pictures of the dispute area shall be taken and forwarded to the representatives of the Union who receive copies of the inspection report.

SECTION 4

JOINT UNION-MANAGEMENT SAFETY AND HEALTH MEETINGS

At least once each month the designated Representatives of the Union and Company shall meet and take up

such complaints as may be brought forth by either the Union or Company Representatives.

The Union and the Company shall advise each other, in writing, sufficiently in advance of the meeting the items it wishes to discuss.

The written report of the prior plant inspection shall be reviewed.

The Company shall inform the Union what Safety and Health recommendations have been completed. The Union shall indicate to the Company their agreement or their disagreement as to whether or not the recommendations have been completed.

The Company shall inform the Union what Safety and Health recommendations have not been completed, and the reasons therefore. The Union shall indicate to the Company their position on the recommendations that have not been completed.

Special attention shall be given to items that appeared on prior inspection reports.

SECTION 5

SPECIAL SAFETY AND HEALTH MEETINGS

Special meetings may be requested by the Union or Company Co-Chairman. Such meetings shall be held within twenty-four (24) hours after notification, or, as otherwise might be mutually agreed to by the parties.

The purpose of the meeting shall be to take up matters of Safety and Health that require immediate consideration and action. The Union and the Company shall advise each other who their respective representatives shall be.

SECTION 6

FIRST AID FACILITIES AND REPORTS

First aid facilities and a registered nurse or a qualified first-aid attendant who is an employee of the Company shall be provided by the Company to the extent necessary to provide adequate first aid for all employees on all shifts.

The Company will provide the Union Co-Chairman with daily copies of all first aid reports involving bargaining unit employees of the Company.

SECTION 7

ACCIDENT INVESTIGATION AND REPORTING

The Union Co-Chairman, area, zone and divisional Committeeman shall be notified immediately when an accident has occurred. The accident investigation shall be held immediately or as otherwise mutually agreed to.

Designated representatives of the Union and the Company shall convene and investigate all accidents involving fatalities, disabling injuries, extended loss of time by an employee, or such other serious situations as merit investigation in the opinion of the Union or the Company.

The Union and Company Representatives shall make on-the-spot investigations, hear witnesses, and examine records as required in the opinion of the Union or Company, to determine the cause of the accident.

Remedial or preventive measures, to prevent re-occurrence, shall promptly be put into effect.

The accident report shall be prepared by the Company on a form mutually agreed to. The Company shall furnish adequate copies of all accident reports to the Joint Safety and Health Committee in each plant. One copy of the report shall be sent to the International Safety and Health Department.

SECTION 8

QUARTERLY SAFETY AND HEALTH REVIEW MEETINGS

The Staff Representative who services the Local Union, the President of the Local Union, and the Chairman of the Safety and Health Committee, and the designated Representatives of the Company shall meet every three (3) months to review and evaluate all aspects of the Safety and Health Program in conformity with the agenda agreed to by the Union and Company. The agenda for this meeting shall include the Plant Inspection Reports, (see Section 3), and the following:

ACCIDENT INVESTIGATION REPORTS

FIRST AID CASES

NATURE OF LOST-TIME INJURIES

TYPES OF ACCIDENTS

CLASSIFICATION OF INJURIES

SAFETY STATISTICS—FREQUENCY-SEVERITY

SAFETY AND HEALTH RECOMMENDATIONS

HOUSEKEEPING SUMMARY

NOISE EXPOSURES

UNSAFE CONDITIONS SUMMARY

In the event disputes should develop between the Union and the Company as to the accuracy of either party's statements, relating to their evaluation of the program, this disagreement shall not hold up the Quarterly Review Meeting. The disputes shall be so noted in the minutes, and the meeting shall continue. The items of dispute shall be brought up after the meeting has been completed in the Special Safety and Health meetings, as set forth in Section 5.

SECTION 9

ANNUAL MEETING

The Union and the Company shall each designate three representatives to a joint committee on safety which shall meet annually to review the operation of the program with a view to achieving maximum understanding as to how the Company and the Union can most effectively cooperate in achieving the objective set forth in the Safety and Health Article.

SECTION 10

MINUTES OF SAFETY AND HEALTH MEETINGS

Minutes of all Safety and Health meetings between the Union and Company shall be prepared by the Company.

Copies of the minutes shall be mailed to the Staff Representative, Local Union President, and the Union Safety Chairman within ten (10) days, (excluding Saturday, Sundays, and holidays), after the date on which the meeting was held.

If the Union Chairman shall disagree with the accuracy of the minutes as prepared by the Company, he shall set forth his reasons for such a disagreement in a letter to the Company; and the minutes, except for said disagreement, shall be regarded as satisfactory.

Minutes shall conform to the following outline:

(1) Date and place of meeting;

(2) Names and positions of those present;

(3) Description of each Safety and Health subject discussed;

(4) Statement of Union position;

(5) Statement of Company position;

(6) Summary of discussion;

(7) Decision reached, if any.

SECTION 11

PROTECTIVE DEVICES, WEARING APPAREL AND EQUIPMENT

Protective devices, wearing apparel and other equipment necessary to protect employees from physical and health hazards shall be provided by and paid for by the Company.

Protective devices, wearing apparel and equipment shall be mutually agreed to and listed in a "Safety Book". The book shall be reviewed and brought up-to-date twice each year. The Company shall make provisions for the proper cleaning and maintenance of all safety equipment and wearing apparel.

SECTION 12

NEW OR CHANGED PROTECTIVE DEVICES, WEARING APPAREL AND EQUIPMENT

When the Company changes current protective devices, wearing apparel and equipment, or extends the use of protective devices, wearing apparel and equipment to new areas, or issues new rules relating to the use of protective devices, wearing apparel and equipment, the matter will first be discussed with the designated Representatives of the Union.

When agreement has been reached on the new or changed protective devices, wearing apparel or equipment, it shall be set forth in the Safety Book as outlined in Section 11.

SECTION 13

NEW OR CHANGED WORK PROCESSES

Prior to changing a current work process or the introduction of new machinery, or the establishment of a new work process, the Company shall notify the designated Representatives of the Union.

The designated Union and Company Representatives shall inspect the changed or the new work process or the new machinery before they are put into operation to insure the safety of the employees.

The employees who work on the changed or new work process, or the new machinery shall be instructed and trained in their safe operation.

SECTION 14

HEATING, VENTILATION AND AIR CONDITIONING

Proper heating, ventilation and air conditioning systems shall be installed where needed, and maintained in good working condition.

The word "Proper," as used in the preceding paragraph, in relation to ventilation shall mean: as set forth by the American Conference of Governmental Hygienists, Eleventh Edition, 1970, Library of Congress, catalog card number 62-12929, and as improved by the American Conference of Governmental Hygienists from time to time.

The word "Proper," as used in the first paragraph of this section, in relation to heat shall mean: where practicable in the judgment of the Union and Company Safety Representatives.

The words "where needed," as used in the first paragraph, shall be determined by the Union and Company Safety Representatives.

SECTION 15

CHEMICALS, SOLVENTS AND COMPOUNDS

Where the Company is currently using chemicals, solvents and compounds, or when new chemicals, solvents or compounds, etc. are to be introduced, the Company shall

inform the employees what hazards, if any, are involved, and what precautions are taken to insure the Safety and Health of the employees. The Company shall supply documentary evidence to the Union to this effect.

SECTION 16

IONIZING RADIATION

Where ionizing radiation is possible, the Company shall maintain Safety Standards not less than those accepted by the Federal or State Standards, which are now in effect, or may be promulgated in the future.

SECTION 17

IN-PLANT AIR AND WATER POLLUTION

The Company shall, to the greatest degree possible, continue to work toward the elimination of all pollution, particularly in the "In-Plant" area.

The Company will conduct periodic In-Plant air and water sampling and testing under the direction of qualified personnel.

Where the Union Co-Chairman alleges an on-the-job health hazard due to air or water pollution, the Company will make additional tests. The report based on such additional tests shall be submitted to the designated representatives of the Union at a meeting, and the findings evaluated in accordance with Table 42-B, Threshold Limit Values for 1968, as adopted by the American Conference of Governmental Industrial Hygienists in St. Louis, Mo., May 13, 1968.

If such evaluation indicates an excess of the Threshold Limit Values in the said table, the Company shall take immediate steps to correct the situation.

SECTION 18

PERMISSIBLE NOISE EXPOSURES

No employee shall be subject to sound levels exceeding the limits set out in paragraph 50-20410 of the Safety and Health Standards for Federal Supply Contracts under the Walsh-Healey Act, or the Standards of any subsequent Federal State or Local Acts or Laws, whichever is higher.

SECTION 19

GOVERNMENT INSPECTIONS AND REPORTS

When any branch of the Federal, State, Provincial, County or City Government conducts an inspection or test in any plant or sub-section thereof, either regular or at the request of the Union or Company, the following procedure shall be followed:

As soon as the Company knows that an inspection or a test is to be made in the plant or sub-section thereof, they shall promptly notify the designated Union Representatives.

The designated representatives of the Union shall accompany the Inspector to an area of the plant where the inspections are to be made, or where the test is to be taken.

The results of such an inspection or test, copies of which are given to the Company by the branch of the Government which made the inspection or test, shall also be given to the Union by the Company.

The Company shall also furnish to the Union copies of all reports relating to Safety and Health submitted by the Company to any agency of Local, Provincial, State or Federal government.

SECTION 20

WORKING ALONE

No employee shall be required to work alone in any area beyond the observation of other persons.

SECTION 21

ACCESS TO THE PLANT

Representatives from the International Safety and Health Department and/or their technical advisors shall be permitted ingress, after proper notice, to all plants of the Company for the purpose of determining fact in Safety and Health situations where disputes have developed between the Local Union and Company.

SECTION 22

SAFETY EDUCATION AND TRAINING

A Safety Talk Program shall be established, where none exists, which shall provide at least one (1) safety talk to the employees per week. This program is to be administered by the Company through the foreman or other safety representatives of the Company. One half of the safety talk shall deal with general items relating to Industrial Safety and Health. The second half of the talk shall deal with the employee, his job, his department, and/or immediate work area.

IN ADDITION, ALL NEW EMPLOYEES HIRED BY THE COMPANY SHALL BE GIVEN A THOROUGH ORIENTATION OF THE SAFETY AND HEALTH PROGRAM.

The Company and the Union shall establish and maintain a sound, practical, and workable Safety Education Training Program.

The Safety Education Training Program shall cover two (2) primary areas, and shall be governed by acceptable safety methods and procedures.

The first area will provide for Safety Education and Training in general; programs such as hard hats, eye protection, safety shoes, fire prevention, etc.

The second area will provide for individual Safety Training of the employees; his job, his responsibilities, safety-wise to himself and others, the equipment, tools and materials he uses, chemicals, solvents, compounds, etc.

The Company and the Union shall avail themselves of Safety Education Programs provided by the several States where such programs exist.

SECTION 23

ALCOHOLISM

Without detracting from the existing rights, and obligations of the parties recognized in the other provisions of this Agreement, the Company and the Union agree to cooperate at the plant level in encouraging employees afflicted with alcoholism to undergo a coordinated program directed to the objective of their rehabilitation.

SECTION 24

PAY ON DAY OF INJURY

An employee hurt in an industrial accident will be paid for the hours lost receiving medical care on the day he was hurt and subsequent days at his straight time hourly base rate, plus any overtime premium and applicable shift differential. In cases where the attending doctor or nurse thinks the employee should not return to work and finish out the work day, he will be paid in accordance with the above for all hours he would have worked that day.

SECTION 25

POLLUTION SHUTDOWN

Any employee whose layoff is at least in part the result of a plant or department shutdown for purposes of remedying pollution conditions shall, during the term of such layoff, receive his normal earnings. For purposes of this section normal earnings shall be computed in the same manner as vacation pay.

SECTION 26

COMPLAINTS AND/OR DISPUTES

Complaints:

It is the intent of the parties that no employee or employees shall be required to work under conditions which are unsafe or unhealthy, and that an employee who believes that he is being so required shall have the right to:

(1) File a grievance in the —— step of the grievance procedure for preferred handling in such procedure and arbitration; or

(2) Meet with their foreman to make him acquainted with the nature of the complaint. The foreman shall investigate the complaint immediately. If the foreman determines the complaint to be valid, immediate corrective action shall be taken and the employees shall be informed of this fact.

If the foreman determines that no hazard exists, he shall so inform the employee or employees. A discussion relating to the foreman's findings shall then be held. If, as the result of such discussion, the complaint is not resolved and the employee or employees still believe that a hazard exists they shall have the right to:

(The following step shall be used where there are Shift Safety Representatives).

Have the foreman summon the Shift Safety Representative. After the Shift Safety Representatives has investigated the complaint, a discussion shall be held relating thereto. If it is then determined that a hazard exists, immediate corrective action shall be taken.

In the event the complaint is not resolved as the result of such discussion, and the employee or employees and the Shift Representative still believe a hazard exists, the complaint shall then be reduced to writing on a form that has been mutually agreed to, which shall be provided by the Company.

On the form the Union Shift Representative shall set forth all matters relating to the nature of the complaint. The foreman shall set forth the results of his investigation, and set forth why he feels a hazard does not exist. The form shall be signed by the Union Shift Representative and the foreman. The Shift Representative shall then have the right to:

(Where there is no Shift Representative, the form referred to in the preceding paragraph shall be filled out by the area, zone or divisional Committeeman as set forth in the following paragraph):

Request the foreman to notify the designated zone, area or divisional Union Safety Representative and the designated Representative from the Company, and make them aware of the existence of the Safety and Health complaint. This notification shall be made immediately.

At this point in the procedure the employee or employees shall be granted relief from their job or jobs

without the loss of their right to return to such job or jobs, and be assigned other work of a similar job content and pay until the dispute is settled in the above prescribed manner.

In the event the Company decides to continue to operate the job or jobs in question, the employee or employees who were given relief from the job or jobs shall have the right to inform the newly assigned employees why they felt the job was unsafe.

The Union and Company Representatives shall make arrangements to review the written complaint and view the scene of the complaint. After the review and investigation, a meeting shall be held. The Union Representatives at this meeting shall be the zone, area or divisional Committeemen, and the Shift Representative, and the designated Company Representatives. If, during the course of the meeting, it is determined that a hazard does exist, immediate corrective action shall be taken.

In the event the complaint is not resolved during the course of the meeting, and the Union zone, area or divisional committeeman still believes that a hazard exists, he shall have the right to:

Notify the Union Safety Chairman of the existence and nature of the complaint.

The Union Chairman, zone, area or divisional Committeeman and the Shift Representative, and the designated Representative of the Company shall make arrangements to review the written complaint, investigate the scene of the complaint, and then to meet on the matter.

If, during the course of this meeting it is determined that a hazard does exist, immediate corrective action shall be taken by the Company.

In the event the complaint is not resolved during the course of the meeting, and the Union Chairman believes

that a hazard does exist, he shall notify the President and the Grievance Chairman of the Local Union, and the Staff Representative who services the Local Union.

The unresolved complaint now becomes a dispute.

Disputes:

The Staff Representative, Local Union President, Union Chairman and Grievance Chairman, and the designated Representatives from the Company shall make arrangements to review the written complaint, investigate the scene of the complaint, and then to meet. If, during the course of this meeting it is determined that a hazard exists, immediate corrective action shall be taken by the Company.

In the event the complaint is not resolved during the course of this meeting, and the Staff Representative still believes that a hazard exists, he shall have the right to:

Notify the Company that the dispute shall be arbitrated immediately.

The Arbitrator shall be called by the Union and the Company immediately. He shall review the written complaint, investigate the scene of the complaint, and then meet with the Union and Company to hear their arguments relating to the dispute. He shall render his decision immediately.

In the event the Arbitrator determines that a physical or health hazard does exist, he shall have authority to order a remedy.

In the event the designated Union Representatives believe a physical or health hazard exists, or that any of the sections of this article are being violated by the Company, they shall be permitted to utilize the foregoing procedure, even though no complaint was registered by the employee or employees.

All quota systems relating to alleged safety violations, e.g. where a supervisor must, within a given period of time, issue a certain number of Safety Violation slips to the employees under his jurisdiction, be discontinued forthwith.

All Safety Violation slips now in an employee's file, which were handed out in the above described manner, be removed from the files and be declared null and void.

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF SHOSHONE

[Title omitted]

AFFIDAVIT OF LAVERN A. MELTON IN SUPPORT OF DEFENDANT STEELWORKERS' MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, FOR PARTIAL SUMMARY JUDGMENT

Lavern A. Melton, being duly sworn, deposes and says:

1. I was employed by the Sunshine Mining Company ("Company") at its underground mine in Kellogg, Idaho during the period from August, 1965 until May, 1979. From 1965 to about 1969 I worked as a contract miner; thereafter, beginning in 1969, I worked as a shaft repairman.

2. Throughout this time frame and continuing to date, the United Steelworkers of America, along with its Local 5089, has been the exclusive bargaining agent of the Company's production and maintenance employees under a series of successive collective bargaining agreements executed between the parties. The Agreement in effect on May 2, 1972 was the three-year agreement dated March 11, 1970.

3. I was elected President of Local 5089 in the spring of 1970, after the death of my predecessor, Richard Fleming, and was serving in that capacity at the time of the underground fire at Sunshine on May 2, 1972. Prior to being elected President, I served as the Financial Secretary. During the first term of my presidency (i.e.,

until June 1973) the membership of Local 5089 consisted of about 500 rank-and-file employees of Sunshine Mine.

4. The International Constitution provided for each local union (I believe there were approximately 5,000 Steelworkers locals chartered by the International as of 1970) to establish a Safety and Health Committee. Local 5089 had such a committee prior to my election as President. As President I was automatically an ex officio member of the Local's Safety and Health Committee, as well as other committees.

5. Shortly after I became President, there were several vacancies on the Safety and Health Committee and I appointed rank-and-file members to fill them. Neither the International Constitution nor the Local Union By-Laws contained any written criteria or qualifications for making such appointments. In exercising my authority to make the appointments, I was well aware that none of the rank-and-file members of Local 5089 were mining engineers or had other professional degrees or other background that qualified them as experts in mine safety. This was also a matter of common knowledge among the membership of Local 5089. Because none of the rank-and-file members were experts in mine safety, I knew that in carrying out their activities the Committee members could only be expected to rely on their common sense and practical knowledge from their experience as underground miners. In selecting members to serve on the safety committee, I looked for certain characteristics that I believed would make it possible for the committee to serve its intended function: (1) the person had to be in a job which, over a period of time, brought him into contact with workers scattered throughout as broad an area of the mine as possible; (2) the person had to be conscientious and responsible about carrying out his committee activities—including being willing to make himself available to the membership when needed; (3) the person had to have acquired some practical, first-hand

experience in job safety within the mine; and (4) the person had to be an individual who was not easily intimidated by the Company. By tradition, one member of the Committee was selected from among the employees who worked above ground. That person was not expected to have underground working experience.

6. During the period from the summer of 1970 until the Sunshine fire in May 1972 Local 5089's Safety and Health Committee consisted of Chairman Don Beehner (whom I appointed), Einar Peterson, Gordon Whatcott (whom I appointed), and Kenneth Chambers (an above-ground worker). Beehner and Whatcott died in the fire; Peterson survived the fire, but died several years ago of unrelated causes.

7. In accordance with the requirements of the International Constitution, Local 5089 conducted regular monthly membership meetings. They were held on the second Saturday of each month. On those occasions, the general activities of the Local were discussed and the chairmen of various committees, including the Safety and Health Committee, gave regular status reports concerning matters of current interest. (The kinds of matters on which the Chairman of the safety committee would report included grievances related to safety concerns, the outcome of state or federal inspections of the mine, and the status of efforts to obtain federal or state regulations or legislation.)

8. In addition to the regular monthly membership meetings, rank-and-file members learned what was going on in the mine with respect to safety and health issues through various informal channels. Workers assigned to the various shifts changed into their work clothes in the same area prior to their shifts and showered together at the end of the shift. Members of the Safety and Health Committee and myself were available to the membership on those occasions. Any member who wanted to voice a complaint or raise a question concerning safety

and health—no matter how major or minor a problem—had the opportunity to do so. On numerous occasions I was approached by members—individually or in small groups—who told me that they believed that a certain safety hazard existed or who asked about the status of some safety matter. In this setting, both before and after my shift, I also regularly spoke with the Local's safety committeemen concerning their activities in administering the safety and health article of the collective bargaining agreement. Because Local 5089 was a relatively small organization that functioned informally, the members knew who the safety committeemen were and what was going on in the mine with respect to safety and health issues. In addition, the members periodically had an opportunity to observe their safety committeemen in connection with monthly joint labor-management safety committee tours of the mine and, as well, the periodic mine inspections conducted by the State of Idaho in which Local 5089 committeemen accompanied the inspectors pursuant to the provisions of the collective bargaining agreement. Finally, the chairman of the safety committee periodically reported to the membership on current matters of interest relating to the Sunshine Mine at the Local's regularly scheduled membership meetings held on the second Saturday of each month. (See discussion at paragraphs 10, 11-13.)

9. I never represented or stated at any membership meeting or on any other occasion that the Union had any expertise in mine safety generally or in mine ventilation or evacuation systems in particular or, further, that the membership should rely on the Union to guarantee or ensure that no hazardous conditions of employment would exist at the Sunshine mine. As President, I regularly attended the membership meetings (during the period 1970-72 I believe I missed only one or two because of conflicts with my shift at work). I never recall any member of the Local's Safety Committee ever making

any such statements or representations at a meeting or for that matter on any other occasion. Indeed, the underground miners (including myself) who comprised the large majority of the membership were well aware from their own daily first-hand experiences in the mine not only that the union had no authority to correct safety hazards but also how dangerous an occupation it was and, as well, how difficult it was to get this Company to eliminate the hazards we faced.

In those circumstances, even if I had been silly enough to claim that I or any other union official was an expert on mine safety, the underground miners, in my judgment, would have paid no attention to any such claim. They knew better.

10. The provisions set forth in the Safety and Health Article of the collective bargaining agreement between the parties define the extent of the Local Union Safety and Health Committee's authority. Article IX of the March 11, 1970 Agreement (which was in effect at the time of the fire) provided in full as follows:

Safety and Health

1. The Company and the Union will continue to cooperate toward the objective of eliminating accident and health hazards. The Company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment. Protective devices, wearing apparel, and other equipment necessary to protect employees from injury shall be provided by the Company in accordance with practices now prevailing in each separate department or as such practices may be improved from time to time by the Company.

2. An employee who believes that he is being required to work under conditions which are unsafe beyond the normal hazards inherent in the operation

in question, may request an immediate meeting with the shift boss, with or without consultation with his Assistant Grievance Committeeman. If, as a result of these actions, the employee still believes he is being required to work under conditions which are unsafe beyond the normal hazards inherent in the operation in question, a committee consisting of two (2) supervisory personnel and two (2) reliable employees, approved by the Union, shall inspect the operation in question within twenty-four (24) hours and shall decide what steps, if any, are necessary to correct the hazard.

In the event the committee cannot agree, the employee involved may then file a grievance in Step 2 of the grievance procedure. It is understood and agreed that if a grievance is filed on an unsafe working condition, management and Union representatives shall give said grievance preferred handling, and shall expedite its movements through the grievance procedure.

The employee may on request, be relieved from the job and be assigned to other work at the discretion of the Company. If an employee exercises his rights under this section and the Company believes conditions are not beyond the normal hazards inherent in the operation in question, nothing contained in this section shall abridge the rights of the Company under other sections of this Agreement.

Neither shall the foregoing preclude the Company from assigning another employee to the job in question and it is further understood that no employee, other than communicating the facts, shall take any steps to prevent another from working on the job.

3. A Safety Committee consisting of three employees designated by the Union and three Management members designated by the Company shall be

established. By mutual agreement, the committee may be increased to not more than six representatives for each party. The safety committee shall hold regular meetings at times determined by the committee. The function of the safety committee shall be to advise with the Plant Manager concerning safety and health matters but not to handle grievances. In the discharge of its function the safety committee shall: Consider existing practices and rules relating to safety and health, formulate suggested changes in existing practices and rules, and recommend adoption of new practices and rules. Advices of the safety committee, together with supporting suggestions, recommendations and reasons shall be submitted to the Plant Manager for his consideration and for such action as he may consider consistent with the Company's responsibility to provide for the safety and health of its employees during the hours of their employment and the mutual objectives set forth in Section 1.

4. A Union member and a Management member of the safety committee may accompany the State Mine Inspector or his Deputy, on any inspection made at the property.

5. Two men shall be designated by the Union to accompany the Safety Engineer on tours of the mine. Once each month, one of these two men, together with the Safety Engineer, shall make a tour of a section of the mine. The results of this tour shall be considered at the following Union-Management safety committee meeting.

6. In the event a recommendation with respect to safety conditions that needs action immediately, concurred in by a majority of the entire committee, is not carried out, the Union may have recourse to the grievance procedure.

The Union representatives' right to participate along with an equal number of management representatives in joint monthly tours of various sections of the mine, to participate along with Company representatives in periodic inspections conducted by the State of Idaho mine inspectors, to "advise with" and make "suggestions [and] recommendations" to the Plant Manager concerning how to abate safety hazards, and to file grievances in the limited circumstances permitted by Article IX, § 6, all owed their existence to the specific provisions of the Safety and Health Article of the collective bargaining agreement. Neither the local union nor the safety and health committee had any other contractual right or authority to deal with the Company on questions of safety and health. And, to the extent that the Union Safety Committee undertook to act, it did so in the capacity of administering and/or enforcing that Article of the agreement.

11. Pursuant to the collective bargaining agreement, the Company was obligated to "provide a sufficient number of printed copies of th[e] contract to enable each member of the Local Union to secure a copy" (Art. IX, § 6). Each member had received a copy of the 1970 contract far in advance of May 1972.

12. As noted, under the 1970 Agreement, in any circumstance where the Union safety committee members believed that a safety hazard existed which required abatement, their role under the Agreement was limited to "advising with" and making "recommendations" to the Plant Manager "for his consideration." The Union had no authority to correct any safety hazard that it believed to exist and its recommendations were, by the express language of the Agreement, subject to the final decision of the Plant Manager. The Company retained the sole prerogative and the entire responsibility for determining what safety measures, if any, it would put into effect. (Based on my personal experience in dealing

with the Sunshine management, I can state that this Company was very difficult to budge; it closely guarded its managerial discretion and prerogatives—especially when a Union recommendation would require some substantial cost.)

13. In any event, under Article IX, if the Plant Manager rejected a Union committee recommendation—as he had an absolute contractual right to do—there was nothing the Union could do through the grievance process. There were only two avenues open: if an individual employee faced a condition that was unsafe beyond the normal hazards inherent in that operation, he could exercise his contractual right to refuse to perform the particular operation, and the Company could not impose discipline on him for refusing to do so; second, the Union could request an inspection by the state or federal mine inspectors with the hope that the inspectors would issue a citation against the Company and set an expedited abatement date. In evaluating what assistance Local 5089 could expect to get from the state or federal inspectors, the officers and safety committee members recognized and advised the general membership that the inspectors could cite the Company only if it failed to meet a mandatory provision of the Code. There were many loopholes in the Code, and it was the Union's experience that the Company consistently told us that it would not make any changes that were not required by mandatory Code provisions.

14. In practice, the Local generally preferred to request state rather than federal inspections. There were several reasons: (1) under the terms of Article IX, § 4 of the collective bargaining agreement quoted above, the Company was not obligated to permit a Union safety committeeman to accompany a federal inspector. Thus, the Union did not have the benefit of its representative's presence in a federal inspection whereas, under the contract, it did when a state inspection took place; (2) as a

consequence, the Union committeemen became acquainted with and built up a level of confidence in the state inspector; and (3) since the worker protection provisions of the Idaho Code had to be "at least as effective as" the federal law, we believed that it made sense to call in the state inspectors.

15. During my first term as President, staff representative Larry Marshall was assigned by the International Union to service Local 5089 in addition to the other local unions he serviced. Marshall was assigned to the subdistrict 7 office in Spokane which was within the jurisdiction of District 38, USWA. As part of the services he provided to Local 5089, Marshall regularly attended its monthly membership meetings and also was available to me and the other local union officers for advice and guidance on any issues we might raise, including those relating to safety and health. At each monthly membership meeting, Marshall gave an oral report generally relating to activities of the International Union (such as the status of industry bargaining and/or federal legislation that the Steelworkers supported). Larry Marshall had no expertise with regard to mine safety. He had never even worked in a mine and it was common knowledge that prior to becoming employed by USWA Larry worked as a draftsman in an office of a Kaiser Aluminum plant in Spokane.

16. At no local meeting that I ever attended nor at any other time that I'm aware did Larry Marshall ever represent to the members that he—or any other official or employee of USWA—had any expertise in mine safety or that the members should rely upon him or any other Steelworkers official to ensure that their jobs in the Sunshine mine would be free of any hazards. I might add that even if Larry would have made such a statement, I am confident that the miners—who knew better than anyone else about the hazards they faced daily underground—would have paid no attention to him.

17. During my first term as President, I was aware that the International Union had a Safety and Health Department in Pittsburgh. That department then consisted of a Director—Paul Schremp—and a small number of technicians, including Adolph Schwartz and Marco Vestich. None of those individuals was a mining engineer or otherwise expert in mine safety generally or mine ventilation or evacuation systems in particular. As far as I am aware, none of those individuals ever represented otherwise to me or to the membership of Local 5089. Nor did they ever represent to me or to the membership that Local 5089 should rely on them to ensure a safe workplace at the Sunshine Mine.

18. The Department's function was to provide general advice to approximately 5,000 local unions throughout the Steelworkers' jurisdiction in the basic steel, aluminum, can, nonferrous metal, fabricating and miscellaneous industries. In this regard, the Safety and Health Department's function was similar to the function served by the other USWA departments headquartered in Pittsburgh (e.g., the civil rights department, the arbitration department, and the pension and insurance department).

19. Effective May 1979 I was employed by the Steelworkers International Union. Effective August 1, 1983—shortly before I executed this affidavit—I was temporarily laid off from the Steelworkers' payroll as a result of a general layoff affecting several hundred staff representatives and office personnel. As a result of that layoff, I returned to work for the Sunshine Mining Company in Kellogg and I am working underground at the present time.

/s/ Lavern A. Melton
LAVERN A. MELTON

[Jurat Omitted]

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF SHOSHONE

[Title Omitted]

AFFIDAVIT OF LAWRENCE L. MARSHALL IN SUPPORT OF DEFENDANT STEELWORKERS' MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, FOR PARTIAL SUMMARY JUDGMENT

Lawrence L. Marshall, being duly sworn, deposes and says:

1. I am employed by the United Steelworkers of America, AFL-CIO-CLC, International Union as a staff representative, a position that I have held since May, 1967. When I first came onto the staff, and continuing through May 1972, I was assigned, among other things, to service Local 5089. The membership of Local 5089 was comprised exclusively of employees who worked for the Sunshine Mining Company at its Kellogg, Idaho mine. I was never underground in that mine.

2. Among the functions I performed in servicing Local 5089 was to attend its regularly scheduled membership meetings held on the second Saturday of each month. On those occasions, I regularly made an oral report to the membership relating to activities of the International Union of current interest such as the status of industry bargaining and federal or state legislative initiatives that the International was concerned about. In addition, I participated, along with the Local's negotiating committee, in negotiating the March 1970 collective bargain-

ing agreement with Sunshine; I handled grievances in the final step of the grievance-arbitration procedure established by that agreement; and I made myself available to Local 5089 President Melton and his fellow officers to provide advice and assistance, upon request, covering any subject they might raise, including safety and health.

3. I never have had any mining experience, and I never have worked in a mine. Nor have I ever acquired through professional schooling or otherwise any expertise in mine safety in general or in mine ventilation or evacuation systems, in particular. My primary employment experience before joining the Steelworkers staff was in an office job at Kaiser Aluminum in Spokane, Washington, where I worked as a draftsman. I made known all the foregoing to the general membership of Local 5089, and this was common knowledge in the small local community where I resided.

4. At no time at any membership meeting—or on any other occasion—did I ever represent or state to the membership of Local 5089 or any individual members either that I had any expertise with respect to mine safety or that any other Steelworkers official or employee possessed such expertise. Nor did I ever represent or urge any member of Local 5089 to rely upon the expertise of the Steelworkers as a means of guaranteeing or assuring that working conditions in the Sunshine Mine would be safe. As a practical matter, the miners would have paid no attention even if I would have made such statements. The underground miners had first-hand experience with respect to the dangerous conditions that existed in the mine, and they would have been the first to recognize that I had no expertise upon which they should rely.

/s/ Lawrence L. Marshall
LAWRENCE L. MARSHALL

[Jurat Omitted]

ORAL DEPOSITION OF GORDON OSTERBERG
TAKEN 10/17/83

* * * *

[37] Q Did anybody ever tell you prior to May 2nd, 1972, that the union was participating in a Joint Union-Management Safety Committee?

A No.

Q Now, you've talked about the fact that you have seen that group in action after May 2nd, 1972.

A Uh-huh.

Q Did you ever see that group stopping by your work place or being down in the mine, this Joint Management-Union Safety Committee before May 2nd, 1972?

A No.

Q Do you remember anybody reporting at any of the union meetings what if anything the Safety Committee had done or were doing?

A No.

Q Do you know whether or not the union had a Safety Committee prior to May 2nd, 1972?

A No, I don't. I don't know.

Q If you had a complaint about your working conditions or management or safety in the mine prior to May 2nd, 1972, who would you take that complaint to?

A You mean if there was something that wasn't safe where I worked?

Q Sure.

A To Bebb, my shifter.

[38] Q And if Bebb wouldn't do anything about it, who would you take your complaint to?

A Oh, I guess I would have had to go higher up. But he always, like I say, took care of it.

Q You never had to go to the union with any of your complaints, then?

A No.

* * * *

[48] Q (By Mr. Howard) For the initiation fee that you paid and the dues that you paid in, what did you get from the union? What were they supposed to do for you? What was your understanding?

A Well, I couldn't just sit here and tell you all what they were, but lots of things. It's just like now, I am getting my teeth fixed. I am still a union member and still—The union pays the dental work. And I am now getting my teeth fixed. That's one of the benefits I got out of it, among a lot of other things.

Q You got a retirement?

A Well, what it is there is, they keep us retirees on the dental plan, you see.

Q Did you expect the union to represent your interest when it came to anything that had to do with the company?

A Yes.

Q Did that include things like wages—

A Yup.

Q —and fringe benefits—

A Yes.

Q —like dental? And how about safety; were they [49] supposed to represent your interest with regard to safety?

A Well, yeah.

Q And if you had a safety problem, even though you didn't remember who was on the Safety Committee or even if there was a Safety Committee, who would you have taken your complaints to prior to May 2nd, 1972?

A Like I said, Bebb.

Q Bebb was your shifter?

A Yeah.

Q If the union was going to represent your interest against the company—

A It was up to Gipson.

* * * *

ORAL DEPOSITION OF KENNETH RILEY
TAKEN 10/17/83

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[11] Q You mentioned earlier that you suggested to the union that the "48-4" stope should be shut down?

A Yes.

[12] Q Why should it have been shut down?

A It was air blasting every day. They was mining around it, and I fitured if they shut it down, that maybe that it would quit, you know; why they would take pressure off of it. They never did quit it when I was in there. It blasted just about—at least once a week.

Q How do you mean air blasted?

A Just blew up.

Q And if they had shut it down, that would have solved that problem?

A I thought they shouldn't have been in there. No, I don't think—It might not have solved the thing. But when they mined around it, I figured—I thought it was too dangerous to work in there.

Q And you told that to Mr. Gipson?

A Yes.

Q And what did he tell you?

A To quit it.

Q What did he mean by that?

A To quit it, just stop, just put someone else in there. I could have quit it and went to some other stope. I didn't think that was the answer. But then they got it mined out I guess.

* * * *

[43] Q Do you ever recall any union representative promising to eliminate hazards in the mine?

A No.

Q Would that be true both before and after the fire?

A Yes.

Q Did you believe the union was in a position to eliminate hazards in the mine?

A I thought they must be doing—they should be doing something, because they was running an inspection. Otherwise, why bother going?

Q Would it be fair to say you thought that whatever this union could do had to be done through the Joint Safety Committee?

MR. HOWARD: I object to the form of the question.

Q (By Mr. Nelson) You don't have to be bothered by that.

A Say that again.

[44] Q Would it be fair to say you believe that whatever the union could do about safety had to be done through the Joint Safety Committee?

A I figure maybe—I don't know. If they would get together and have an inspection and see what was wrong, I imagine that's the way they would do it. I don't know.

Q Did you think the union had any responsibilities regarding safety besides the Joint Safety Committee?

A Oh, yeah, I imagine they do. I figured they should have some responsibilities on that.

Q And which ones did you think they should have?

A Same responsibility the federal or state got. I mean, they all work together on it. They should all be kind of responsible for what they are doing. Just like if I am painting your house, and I paint my side, and I had these other guys working for me, I would be responsible for the house, too. I got influence or something—

Q Would you like to take a break?

A That's all right. I got to get to work at quarter after 1:00 at least.

Q Now, you said you read some of the federal laws about mine safety?

A Yes.

Q It's true, isn't it, the federal government had the power to shut the mine down?

[45] A Yeah.

Q And Sunshine had the power to shut the mine down?

A I guess it could. It's their mine.

Q But the union didn't have that power?

A Not unless they wanted to strike or something.

Q So, there is a difference between the union's and the federal's rights?

A Oh, yeah—Well, I don't know. They did have—They called it a safety or something—They had a strike or something—I don't know—wildcat strike or something up at the mine on safety or something that's supposed to be—or something. I don't know. —to work for a couple weeks—I think that was more on wages or something.

Q That was after the fire?

A Yes.

* * * *

[66] Q Prior to May 2nd, 1972, did you know of any method by which you could get through smoke and various gases created by a fire without it affecting you?

A No; just a wet T'shirt or coat or something.

Q Was that something that was taught to you as a miner or something that just came to you watching TV or learing from your folks?

A Watching television or talking about wetting my clothes a little bit.

Q Did anybody ever talk of any surviving techniques such as moving toward fresh air or anything like that prior to May 2nd, 1972?

A No.

Q Did you ever have any training program by anyone at Sunshine while you were employed at Sunshine explaining to you how to survive an underground fire?

A No.

Q Did anybody from the union ever identify for you who was on the union Safety Committee?

A No.

Q If you had a complaint about job safety, who would you take that complaint to prior to May 2nd, 1972?

A Gipson. Usually that's the one I would see.

Q Why would you take your complaint to Mr. Gipson?

[67] A Because he changed right there by me at the time.

Q What position did you believe Mr. Gipson had with the union at that time?

A He was vice-president.

Q What did you feel Mr. Gipson was supposed to do with your complaint? What was your understanding of what he would do with your complaint?

A I didn't know.

Q What did you expect him to do?

A I thought he would go to the top or whatever, you know, or go to the company with whatever when he got a complaint.

Q Prior to May 2nd, 1972, what was your understanding as to who represented your interest when it came to job safety?

A Well, federal, state and the union.

Q Did anyone from the union prior to May 2nd, 1972, ever tell you that they could not help you out when it came to job safety, that you were on your own?

A No.

Q Did the union in any way cause you to believe that you should report safety violations to them, or safety concerns to them?

A No.

Q How was it you came to report those problems that

[68] you saw to Mr. Gipson?

A Well, he would go with the inspectors and such, so I figured he going with them, he could do some work with it.

Q Did anybody ever tell you—anybody from the union ever tell you about the fact they had safety meetings?

A No.

Q You knew about the safety inspections because you saw some of those; is that correct?

A Yes.

Q Were you ever asked any questions on any of these safety inspections by any members of the union or the state or the federal or the company representative?

A No.

Q In the union meetings that you attended, do you remember ever hearing any report from the safety meetings, Safety Committee?

A No.

Q Did anyone from the union ever inform you in any fashion, whether in writing or verbally by talking, that there were people in the union that you could talk to besides Mr. Gipson that had safety responsibilities?

A No. I just—I seen Gipson more than the rest of them.

Q Besies Mr. Gipson, do you know of anybody else who was on the Safety Committee?

[69] A At that time?

Q Yes, prior to May 2nd, 1972.

A No.

* * * *

[70] Q Did you as a miner working underground prior to May 2nd, 1972, rely upon your communication with Mr. Gipson and Mr. Flemming—

* * * *

Q (By Mr. Howard) —to communicate your concern about these safety things to the company?

A I figured they would tell me or somebody about it.

Q Did you also rely upon them to do something about it if that could be done?

A If they could, yes.

* * * *

[73] Q (By Mr. Howard) What else could you do as an individual miner if you wanted to get the condition corrected, or something that could be corrected?

A Well, corrected, I could do it.

Q What else could you do? Could you report that problem to anybody to see if management would correct it?

A The union, that's who I would report to. If I thought something was bad, and I could see that better than anybody else—I don't see mine inspectors every day or the federal people. But the union officials are there.

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ORAL DEPOSITION OF DONALD LONG
TAKEN 10/18/83

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[23] Q How would you describe John Rawson as a worker from your knowledge of—

A Oh, as far as I knew, he was an excellent miner and a good worker.

Q He worked for you on these exploration projects; is that what you said?

A Yes.

Q Was he the only one working on those projects, or was there a regular crew?

A There was maybe four miners. There would have been some other people that worked underground at the Sunshine also.

Q During those exploration projects, would you work [24] closely with John Rawson?

A Well, I would see him maybe every day.

Q Did you have occasion to talk to him—

A Yes.

Q —see the progress of his work and that sort of thing?

A Yes.

Q You did not go underground at all on May 2nd, did you?

A No.

Q Do you know when John Rawson's body was recovered?

A No, I don't recall.

Q Do you recall where it was recovered from?

A No, I don't.

Q At any time that you were in contact with John Rawson, either when he went underground in the Sunshine or when he was working on this exploration project, did you have any opportunity to discuss with him job safety or mining safety?

A I don't believe so, other than just routine things. Those fellows pretty much knew how to mine; they knew how to handle powder, they knew how to work equipment. Other than tell them, you drive this drift this direction and maybe get in there and tell them that you would like to turn it this way or that way, other than that, why you didn't really [25] tell them how to do their work.

Q Did John Rawson strike you as a levelheaded and safety conscious miner?

A Yes. He was.

Q Did you ever observe anything in the contact you had with him that would lead you to believe he ignored safety precautions during his work?

A No. I would think that he was a very—a good, safe worker, at least as far as I can recall. He was never accident prone or anything like that.

Q How about Wayne Johnson; what was the basis upon which you knew Wayne Johnson?

A I really didn't know him that well; just knew who he was, and maybe he would be on a drift or something. That would be—He worked in the Sunshine, and he would be one of the better miners. Probably down in some drift I would see him someplace.

Q What was it that caused you to remember Wayne Johnson as opposed to some other miners? Was there something special about him?

A No.

Q Some relationship you had in the past where you worked closely with him or something?

A No; just remember the name and the person.

Q Did you ever have any occasion to observe his [26] work habits?

A Not specifically, no. But I think that, generally speaking, he was a good miner from the areas he had been working. He was a good miner.

Q When you say "a good miner", does that include being safety conscious?

A Yes.

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ORAL DEPOSITION OF ALBERT C. WALKUP
TAKEN OCTOBER 18, 1983

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[5] Q What was your capacity with Sunshine on May 2nd, 1972?

A I believe I was mine superintendent then.

Q Where were you that day?

A I was in Coeur d'Alene, Idaho.

Q What were you doing in Coeur d'Alene?

A I was at a stockholders meeting, Sunshine Mining stockholders meeting.

Q Were you prior to the fire familiar with the Joint Union and Management Safety and Health Committee at Sunshine?

A Yes.

[6] Q Will you describe in your own words your understanding of the function of that committee prior to the fire?

A The committee, I believe they met monthly, and they made safety suggestions.

Q Who did they make suggestions to?

A Well, Bob Launhardt was the safety engineer at the time.

Q What do you mean by suggestions?

A I guess if they—anybody had a safety problem, that it was brought up at the meeting.

Q And then the committee would pass the suggestion along to Mr. Launhard; is that correct?

A Mr. Launhardt was part of the committee. It was a joint management-union committee, if I remember right. It's been a while ago.

Q What would happen to the suggestion next?

A I guess in some cases, if the safety engineer could act on them, and if he didn't feel he had authority, he would take it to the general manager.

Q Can you think of any instance on which the union could act on a suggestion on its own?

A No.

Q Would you describe in your own words your understanding of the types of suggestions that the safety engineer could have acted upon himself prior to the fire?

[7] A You mean what the safety engineer could have done without going to the manager?

Q Right.

A I really can't think of any offhand. I guess about anything that didn't affect the operation of the mine.

Q If it did, would it be fair to say if it did affect the operation of the mine, he would have to get some authority?

A Right.

Q How about if it required spending money but didn't affect the operation of the mine?

A I am not sure how much money he was able to spend without going to the manager. But I am sure he had to get approval if it was anything significant.

* * * *

[9] Q What was your general understanding, if anything, of the union's role with respect to safety prior to the fire?

A The union's role? I guess it was more to suggest, make suggestions?

Q Just to make this clear, who, to the best of your knowledge, had the final say-so on safety issues under the collective bargaining agreement between the Steelworkers and Sunshine prior to the fire?

A I guess it would have been Sunshine.

* * * *

[10] Q Are you familiar with the distinction between mandatory and advisory mine safety standards?

A Yes.

Q Would you describe in your own words the distinction between mandatory and advisory standards as it existed prior to the fire?

A Mandatory meant that it was a reg that you had to follow. Advisory was just what it says, it's advisory.

Q Was the company obligated prior to the fire to adhere to a mandatory safety standard?

A Yes.

Q Was the company, prior to the fire, obligated to adhere to an advisory safety standard?

A No.

Q Did the company, prior to the fire, have a policy with respect to adherence to advisory safety standards?

A Not that I recall.

Q Did the union, prior to the fire, have the power to make the company adhere to advisory safety standards?

A No, I don't believe so, unless it was bargained for.

Q How do you mean?

A Through the collective bargaining agreement.

[11] Q So, if it was written in the contract, they might have?

A Right.

Q To the best of your understanding, was it in the contract?

A There was a clause regarding safety, but I don't recall what it was.

Q But if it had the power, it would have been found in the safety clause?

A I would think so.

Q Were collective bargaining agreement negotiations part of your responsibility at Sunshine prior to the fire?

A No.

Q Do you have any information regarding the company's negotiating position with respect to safety issues prior to the fire?

A No.

Q Did you ever, prior to the fire, accompany the Joint Union-Management Safety and Health Committee on a walk around underground in the mine?

A I don't recall that I did.

Q Are you aware of any mine safety standard which, prior to the fire, Sunshine was not in compliance with?

A No.

Q Would that apply to both federal and state [12] standards?

A Yes.

Q Would that apply to mandatory as well as advisory standards?

A It applied to mandatory.

Q Have you at any time since the fire became aware of any mandatory safety standards that Sunshine was not in compliance with at the time of the fire?

A No.

Q Mr. Walkup, the plaintiffs have alleged that the union failed to require mine evacuation on the first evidence of smoke underground.

Could the union have required an evacuation?

A I don't really see how.

Q The plaintiffs have also alleged that the union was negligent in that it failed to require fire drills.

Could the union have required fire drills?

A I don't believe so, without going through the safety committee and through management.

Q Does that mean, then, that they had to have management approval?

A I would say so, yes.

Q And so with respect to that sort of thing, management would have the final word, too, wouldn't they?

A At that time, yes.

[13] MR. LEMPESIS: I ask you not to lead this witness, counsel.

Q (By Mr. Nelson) Mr. Walkup, the plaintiffs have also alleged that the union was negligent in that it failed to require adequate protection against spontaneous combustion of discarded timbers underground.

What if anything could the union have done about spontaneous combustion?

A Well, if they were smart enough to know about it, they could have griped at the safety committee meeting or approached the manager.

Q The plaintiffs have also alleged that the union was negligent in that it failed to initiate and instigate the formation of safety programs.

Could the union, in your opinion, have initiated and instigated the formation of safety programs prior to the fire?

A Yes.

Q How do you mean?

A At the union suggestion, it would have been at least taken into consideration by the management.

Q Okay. That, of course, once again, would be subject to management's final word?

A Right.

MR. LEMPESIS: I am going to object and ask you not [14] lead this witness.

Q (By Mr. Nelson) Who, if anybody, had the final word with respect to safety at the mine, Mr. Walkup?

A Final word?

Q Yes.

A The general manager.

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[17] Q What was your understanding of the purpose of the Joint Union-Management Safety Committee?

A The union would make suggestions regarding safety, regarding different things that it thought could be done.

Q All right. And what would be the purpose of eliciting suggestions from the union?

A To make a better place to work.

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[23] Q To your knowledge, did the union ever make any recommendations to the company, Sunshine Mine, prior to May 2nd of '72, with respect to unsafe working conditions or changes in safety conditions?

A I don't remember any.

Q Were you acquainted with the company policy regarding safety during your employ prior to '72, prior to May 2nd of 1972?

A Yes.

Q Would the company of paid any heed to recommendations of the union regarding unsafe working conditions?

A Yes.

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[32] Q Mr. Walkup, you testified in response to Mr. Lempesis's question that the union and Sunshine had a joint responsibility for safety; is that correct?

A Yes.

Q You later clarified that statement by saying that the union's responsibility was to make suggestions; is that also correct?

A Right.

Q In your opinion did the union have any other responsibility for safety?

MR. LEMPESIS: I object to that as calling for speculation and conclusion; and there is no foundation and competence of this witness to answer the question. [33] Go ahead.

THE WITNESS: Did they have any responsibility for safety other than suggestions?

Q (By Mr. Nelson) Yes.

MR. LEMPESIS: I also object on the ground it calls for a legal conclusion.

MR. NELSON: You must not want him to answer it, but—

MR. LEMPESIS: I am making my objection for the record, counsel.

THE WITNESS: They didn't really have any authority, no.

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ORAL DEPOSITION OF LARRY HAWKINS
TAKEN 10/19/83

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[22] Q (By Mr. Nelson) As between the union and management, under the collective bargaining agreement of 1970 who would have the final say-so on a safety issue?

A Well, kind of depends on which way the—really depends on what kind of issue we are talking about, whether it was minor or major. And I suppose it would go before the union committee, and they—or not the union committee but the Safety Committee, and they would resolve it as far as each is concerned.

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[33] Q Did you ever have occasion to hear any agent or representative of the United Steelworkers tell any member of their union that they were not responsible for safety training?

A No.

Q Did you ever have occasion to work with John Rawson?

A No.

Q How about the same question with respect to Mr. Glen Rossiter?

A No.

Q Mr. Wood?

A No.

Q Mr. Wayne Johnson?

A No.

Q Did you ever observe them working that you can recall?

A No, I don't recall.

Q What was your understanding of the purpose of the Joint Safety Committee prior to May 2nd of 1972?

A If a problem arose, why it was brought before the Committee. They resolved it, the problem.

Q And who, to your knowledge, prior to May 2nd, 1972, [34] were the responsible parties on the Joint Safety Committee?

A I don't have any idea.

Q Were you aware prior to May 2nd, 1972, that the union participated as a part of that Joint Safety Committee?

A No, I am not aware.

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ORAL DEPOSITION OF
LESLIE MERRIAL MOSSBURGH
TAKEN OCTOBER 19, 1983

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[3] Q What did you do before you were retired?

A Well, just before I retired, maintenance supervisor.

Q At Sunshine?

A Underground at the Sunshine. And previous to that [4] I worked in the drill shop and on the mechanic crew.

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[6] Q Did you ever, prior to the fire, ask a union representative to file a safety grievance?

A No.

Q Did you ever, prior to the fire, make any complaint or request regarding safety, other than a request to file a grievance, to any union representative?

A No.

Q You never had any problems with safety?

A Never had any problems. Usually, if I did, I would go to the foreman, or whoever was my boss, and tell him.

Q Did you have any contact with any member of the Steelworkers International Union prior to the fire?

A Just one, Laverne Melton. But I don't remember if he was—Oh, he was just local, then—or if he was already with the International—

Q Were you, prior to the fire, familiar with the Joint Union-Management Safety and Health Committee of Sunshine?

A Yes.

Q Would you describe in your own words your understanding of the function of the Joint Union and Management Safety and Health Committee prior to the fire?

A Well, they were supposed to bring up these hazards and hash them out between them and then bring it back to the [7] body of men and tell them what came out of it.

Q What contact, if any, did you have with the Joint Union and Management Safety and Health Committee prior to the fire?

A Just talking man to man, that's all; never did I take it as a—at a formal grievance or anything to any of them.

Q Did you know the union representatives on the Joint Safety Committee were prior to the fire?

A I knew them at the time. I couldn't tell you what the names were now.

Q You did know them at the time?

A Yes.

Q Do you remember any specific conversations with them about safety prior to the fire?

A No, I don't.

Q What power, if any, did the Joint Safety Committee have to influence safety decisions at Sunshine prior to the fire?

MR. LEMPESIS: I would object, counsel, as to the word—form of the question with the use of the word "power". And I would also object to it as it calls for speculation and also a legal conclusion of this witness. He is not competent to testify to that.

You may answer.

[8] Q (By Mr. Nelson) What power, if any, did the Joint Safety Committee have to influence new safety decisions at Sunshine prior to the fire?

A They must have had some, because I know we had to make different changes like air doors and different things like that. It was done by somebody; that is, it was done by the union. The company wouldn't have went to all that expense to change the air doors.

Q What is it that leads you to believe that the union representatives on the Committee had something to do with this air door problem?

A Well, because they were built wrong, and they just kept telling them that they had to change the design of them. And they went through about three designs before they got one they kept.

* * * *

[10] Q Do you have any information regarding the union's position on safety prior to the fire?

A It was very strict, too.

Q And what makes you say that?

A Well, for instance, if somebody neglected to fix the brakes on a motor, then you got it from—The union went to the company, and then the company came back

on you. That was just one instance of what—how they operated.

Q Can you think of any other specifics?

A Well, I have know of times when the declared that something wasn't safe, and then the mechanics would have to go fix it, because I was just on the mechanical end of it.

Q Okay. Who declared it was unsafe?

A Well, evidently somebody—some workman must have turned it in to the union, and they went to the company, and then the company would give us a direct order to repair whatever it was.

[19] Q You also mentioned, I believe, that safety was discussed at almost all union meetings?

A Almost all of them I went to.

Q The meetings which you attended prior to May 2nd, 1972, could you generally describe what types of things specifically were discussed about safety at the union meetings?

A Well, usually it was unsafe practices that the men themselves were doing.

Q Would the men at the union meetings make the union or other members aware of problems with safety?

A Yes.

Q And how was that addressed at the union meetings? If someone came in and said there was a safety problem, what happened then, if you know?

A Well, like any other meetings, that is, one man would get up and tell what was going on on his particular place, and it was a safety hazard, then the man on the floor took it up; and then if it was real bad, why I guess they went to the company with it, because usually they got straightened out.

* * * *

[21] Q How were you acquainted with Mr. Wood, Mr. Mossburgh?

A Mr. Wood was the hoistman on 3700, and I worked on the hoists. So, I was in that hoist room lots of times.

Q During a given week, how often would you see Mr. Wood?

A Every day.

Q Every day?

A Yes.

Q Did you ever have an opportunity to observe him working?

A Oh, yes.

Q In your opinion or having observed Mr. Wood work, did he appear to be a conscientious worker?

A Very.

Q Did he appear to work in a safe manner?

A Yes.

Q Did Mr. Wood follow instructions to your knowledge?

A Any time I was around him, he did, yes.

Q When you were at the union meetings, did you ever see Mr. Wood at those union meetings?

A I don't recall if I did or not.

Q You also indicated you knew Mr. Wayne Johnson [22] fairly well?

A Yes.

Q And how did you know Mr. Johnson?

A He was the shifter. And so I came in contact with him, because I worked out of the shop, and I had to repair his machinery as well as the others.

Q How often would you see him during a given work week prior to May 2nd of '72?

A During the work week, maybe once. I might have seen him every day for a week, and I might go for several days and never see him.

Q Fair enough.

Did you ever have occasion to see Mr. Johnson at work?

A Yes.

Q Did he appear to be a conscientious worker?

A I thought he was.

Q Did he appear to work in a safe manner?
A Yes.

* * * *

ORAL DEPOSITION OF MERLIN MILTON HOFFMAN
TAKEN OCTOBER 19, 1983

* * * *

[4] Q By whom were you employed at the time, before you retired?

A Sunshine Mining Company.

Q How long had you been employed by Sunshine Mining Company?

A Since 1969.

Q Maybe to shorten this up a little bit, I have read prior testimony that you have given in other depositions, and from that testimony I learned that you were the safety engineer at the Sunshine Mine at one period of time. When was that, sir?

A That was from 1968 until probably 1970, roughly in there.

Q What was your position at Sunshine Mine from 1970 [5] through the day of the fire on May 2nd, 1972?

A I think the title was Surface Foreman at that time.

* * * *

[20] Q Were you a member of the Joint Safety Committee?

A Yes.

Q For what period of time?

A Well, while I was safey engineer.

Q What kind of things do you recall would be the subject of conversation or agenda items at a Joint Safety Committee meeting? Do you recall?

A Oh, there were common nature, loose rock, maybe powder primers, which was always a big item. Those were the major items.

* * * *

[24] Q When you referred a minute ago to your safety meetings, are you referring to the Joint Safety Committee meetings?

A Yes.

And those meetings were attended—You tell me. Who attended those meetings?

A As I reca", the union had a representative from the surface, one from the mill, and then maybe one or more from underground.

And did the company also have people—

A Yes.

Q —including yourself?

A Yes.

What was the union's participation, or can you generally describe the union's participation at a Joint Safety Committee meeting? What did they do, if anything?

A Well, usually they would have a list of items that they would like to have looked at or corrected or taken care of, whichever way you want to express it, plus the fact that we might discuss a general first aid session for all employees, scheduling of some special event.

Q Do you recall if the union ever suggested a general training session of all employees for any purpose to—for a safety purpose?

[25] A They may have, but I don't recall of a specific instance.

Q Were you, at the Joint Safety Committee meetings, ever notified by the union or their representatives of any deficiencies or problems that they observed with safety in the mine?

A Yes.

Q Can you give me any example of such a problem or deficiency that arose?

A Common one was probably, like I say, primers, powder, ladders, possibly a defective piece of equipment, something of this sort.

Q What action, if any, would be taken by the committee on such a complaint or a statement by the union of this deficiency or problem?

A Well, the company—I would notify the mine superintendent or the mechanical foreman or electrical, whichever it happened to be, that this would be taken care of before such and such a date.

Q You mean you just told them to do it and correct it?

A That's correct.

Q And you did have the authority to do that?

A Yes.

Q And your authority to do that, was that derived [26] because you were the safety engineer?

A Right.

Q Following your tenure as safety engineer, do you know if your successor, the next safety engineer was also on the Joint Safety Committee?

A I am quite sure he was.

Q Were the self-rescuers, were they provided to each underground employee as issued equipment?

A No.

Q Where were the self-rescuers kept?

A On the main stations, on the shaft stations.

Q Just hanging on a hook or—

A They were in a cabinet with a glass enclosed place.

Q What kind of safety equipment, if any, was issued to miners underground?

A Well, it was mandatory that they had, of course, lamps, belt, pipe wrench, hard hat. And then we also issued individual first aid kits.

Q I am curious about the pipe wrench. Is that a piece of safety equipment?

A I always considered it as such. Underground its kind of a universal tool.

Q Did you ever have any problem with your employees walking off with these issued pipe wrenches that you recall? I am speaking of before the fire.

[27] A Oh, yes. They were supposed to have turned them in, and—but sometimes they weren't.

Q Did you ever discuss safety equipment such as helmets or belts or lamps or pipe wrenches or first aid kits at the Joint Safety Committee meetings?

A Yes.

Q Do you recall what you may have discussed?

A We tried various types, particularly hard hats, goggles, safety shields, boots; and I would issue these to various miners to give them a try. And they would report back as to good, bad or indifferent or useless.

Q Who instigated, or who would suggest items such as goggles or safety shields? What caused you to bring about giving them a try?

A At the end of each month I had to prepare a report on the type of injuries. And from this, if one particular type of injury—first, rock injury, which seemed to be prevalent, then it was discussed; we would discuss this, plus the fact that we should try this or try that or something else.

Q But you tried—

A We were trying all the time.

Q Do you recall if members of the union or the union's representatives on the Joint Safety Committee ever suggested trying some of these things, safety changes or new [28] safety equipment?

A If they did, I would assume we would have tried them.

Q You inspected—I am trying to remember what you said. —how frequently when you were safety engineer?

A I was down ever day. But with the union and with the state and federal, the union once a month. I am sure that's what it was. And with the state and federal, whenever they came in.

Q Did the union ever specifically request a special opportunity to inspect for any purpose?

A They may have. They would lots of times—I wouldn't say lots of times, but at times ask me on my daily rounds to stop and look at a specific item.

Q At a specific item?

A Right, to see what they thought were recommendations on whether it was a maintenance problem or a safety problem.

• • • •

ORAL DEPOSITION OF ROBERT MATTHEWS
TAKEN 10/20/83

• • • •

[6] Q Do you recall ever overhearing any discussion of mine safety at any local union meeting you attended prior to the fire?

A No.

Q Did you ever ask any Steelworker officer or representative to negotiate for any changes in the safety clause in the contract between Sunshine and the union?

A No.

Q Do you know of anyone else who ever asked any union representative to negotiate for any changes in the safety clause in the contract between Sunshine and the union?

A No.

Q Did you ever, prior to the fire, ask a union representative to file a safety grievance?

A No. That's one thing I never have done, filed a grievance of any kind.

Q Did you ever, prior to the fire, make any complaint or request regarding safety, other than a request to file a grievance, to any union representative?

A No.

Q Did you ever have any contact with any member of the Steelworkers International Union prior to the fire?

A Any contact—You mean talking—

Q Any kind of contact, see them, hear them—

[7] A Except what meetings I was to during strike time. As I say, that's all I ever—

Q Do you specifically recall someone had a meeting that was known to you to be a member of the International Union as opposed to the local union?

A No.

Q Were you, prior to the fire, familiar with the Joint Union and Management Safety and Health Committee at the mine?

A Before you mean?

Q Yes.

A No.

Q Did you ever see the committee that had union people on it and management people on it and walking around inspecting the mine?

A Well, they could have been, because at that time I was swamper on the 3700 level, and they could have been.

Q You just don't recall?

A No.

Q Were you aware prior to the fire that a Joint Union and Management Safety Committee existed?

A No. It never occurred to me. So, I don't know. Never heard anything. It's been so long ago, I don't know.

• • • •

ORAL DEPOSITION OF RICHARD NICKELBY
TAKEN 10/20/83

• • • •

[6] Q Did you ever, prior to the fire, ask a Steelworker representative to file a safety grievance?

A I don't think so.

Q Did you ever, prior to the fire, make any complaint or request regarding safety, other than a request to file a grievance, to any Steelworker representative before the fire?

A I don't think so.

Q Did you have any contact with any member of the Steelworkers International Union prior to the fire?

A Not to my recollection.

Q Were you, prior to the fire, familiar with the Joint Union and Management Safety Committee at Sunshine?

A I don't think so. I don't remember it.

Q Did you ever see a committee made up of some union people and some management people walking around doing inspections prior to the fire?

A I don't remember whether I did or not.

Q Do you have any recollection or understanding of the function of the Joint Union and Management Safety and Health Committee prior to the fire?

A No.

• • • •

[15] Q Had you ever seen the self-rescuers before that day?

A I never seen one, no.

Q Had you ever heard of them?

A Yes.

Q Who had told you about the self-rescuers?

A Nobody. They have big boxes down there that had self-rescuer written on the outside of them.

Q Had anyone showed you how to use them prior to that day?

A No.

• • • •

[17] Q Had anybody ever explained to you, prior to the fire, that—what the arrangement was between the company and the union with regard to any safety conditions in the mine?

A Not that I remember.

Q Had you ever had occasion to inquire of anybody as to who you should go to with regard to any safety complaints or suggestions that you had?

A I don't remember.

Q During the period of time that you worked at the Sunshine, do you remember hearing any talk about any safety committees?

A I don't remember any.

• • • •

[23] Q During the period of time that you were employed at Sunshine, were you ever involved in any evacuation drills in the mine?

A Not that I remember.

Q Were you ever involved in any fire drills, which may have been the same thing?

A Not that I remember.

Q Did you attend any meetings that were safety orientation meetings or teach you how to work safely underground or use any safety equipment or anything like that?

A No, not that I remember.

• • • •

ORAL DEPOSITION OF ROBERT FOLLETTE
TAKEN 10/21/83

• • • •

[7] Q Did you join the Steelworkers at that time?

A Eventually. You either did, or they took it out anyway.

Q Were you ever an officer of the Steelworkers prior to the fire?

A No.

Q Were you ever a member of any committee within the Steelworkers prior to the fire?

A No.

Q How often, if at all, did you attend local union meetings prior to the fire?

A Well, because of my living, and I have always lived in Coeur d'Alene, I didn't—I don't suppose I attended over 50 percent, probably.

Q At any of the meetings you did attend, was mine safety ever discussed prior to the fire?

A I just don't recall.

Q It could have been discussed; you just don't remember. Is that right?

A Anything is possible, I guess.

Q Prior to the fire at Sunshine, did you ever ask any union representative to negotiate for any changes in the safety clause in the contract between Sunshine and the Steelworkers?

A Not to my knowledge.

[8] Q Do you know of anyone who ever asked any Steelworker representative to negotiate for any changes in the safety clause in the contract between Sunshine and the Steelworkers prior to the fire?

A No one specifically. There was a generalization about it, but I don't recall.

Q What do you remember generally about safety clauses in negotiations?

A Well, it's kind of a common thing among men. Wherever you work, they discuss safety a little bit among yourselves. But as far as putting it to negotiations, I don't recall that they did.

Q Do you recall ever discussing safety with any union officer or representative prior to the fire?

A No.

Q Do you remember any specific discussions about safety with anyone prior to the fire?

A No.

Q Did you ever, prior to the fire, ask any Steelworker officer or representative to file a safety grievance?

A No.

Q Did you ever, prior to the fire, make any complaint or request regarding safety, other than a request to file a grievance, to any Steelworker representative?

[9] A I don't recall any.

Q Did you have any contact at all with any member of the Steelworkers International Union prior to the fire?

A I'm quite sure I didn't.

Q Were you, prior to the fire, familiar with the Joint Union and Management Safety and Health Committee at Sunshine?

A Well, they had one. We had local men within that that came through now and then. But I don't know if they were company men or joint men. I know we had company safety men that came through. But that might not be what you are interested in.

Q Were you aware of any committee made up of management people and union people that dealt with safety issues prior to the fire?

A There could have been. I don't recall.

* * * *

(5)

Supreme Court, U.S.
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No. 89-322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioner,

v.

THARON RAWSON, Individually and as Guardian Ad Litem for SETH RAWSON and CINDY RAWSON; BERNIECE JOHNSON, Individually and as Guardian Ad Litem for MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON and JOHN RUSSEL JOHNSON; LAURA DUNBAR, as Guardian Ad Litem for RICKINA ROSSITER and GLEN ROSSITER, JR.; and MARY WOOD, as Guardian Ad Litem for LESLIE D. WOOD, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Idaho

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QUESTIONS PRESENTED

1. Does the federal duty of fair representation preempt a state negligence action that challenges a union's performance in administering the safety article of a collective bargaining agreement?

2. Under the principles of contract interpretation applicable pursuant to § 301 of the Labor Management Relations Act, did the union in the collective bargaining agreement at issue here assume a duty to the bargaining unit employees to conduct inspections of the mine?

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Respondents.

On Writ of Certiorari to the Supreme Court of Idaho

BRIEF FOR PETITIONER

This brief is the joint product of the petitioner, United Steelworkers of America, AFL-CIO-CLC ("the union"), and the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"). The AFL-CIO shares with the petitioner a belief that the Supreme Court of Idaho erred in holding that state law tort principles may be applied to judge the adequacy of the union's performance in representing employees in its bargaining unit on matters related to the safety of the workplace. The decision of petitioner and the AFL-CIO to file a single brief reflects the identity of their views on the legal issues presented and their desire to minimize

the burden on the Court by stating their common position only once.

OPINIONS AND JUDGMENTS BELOW

The opinion and judgment of the Idaho Supreme Court that is being reviewed is reported at 115 Idaho 785, 770 P.2d 794, and is reproduced as Petition Appendix A (Pet. App. 1a-13a).[1]

JURISDICTION

This court has jurisdiction to review the judgment below by certiorari pursuant to 28 U.S.C. § 1257(a). The federal questions presented in this petition were properly raised and were decided by both the trial court

[1] There are a number of pertinent earlier opinions that have been issued in the seventeen-year history of this case, and each is reproduced in the Petition Appendix:

—The Idaho trial court's opinion of January 29, 1976, granting the union's first motion for summary judgment (Pet. App. 161a-164a). It is unreported.

—The Idaho Supreme Court's opinion of September 13, 1979, reversing the judgment in favor of the union and remanding for further proceedings (*id.* 107a-160a). It is reported at 100 Idaho 523, 620 P.2d 21.

—The Idaho trial court's opinion of November 1, 1983, granting the union's second motion for summary judgment (Pet. App. 89a-106a). It is unreported.

—The Idaho Supreme Court's opinion of February 24, 1986, affirming that summary judgment (*id.* 49a-88a). This opinion was subsequently withdrawn and is unreported.

—The Idaho Supreme Court's opinion and judgment, issued on rehearing September 4, 1986, reversing the summary judgment (*id.* 13a-48a). It is reported at 111 Idaho 630, 736 P.2d 742. This Court vacated that judgment on the union's petition for certiorari (No. 86-908) and remanded for further consideration in light of *Electrical Workers v. Hechler*, 481 U.S. 851 (1987). *See* 482 U.S. 901 (1987).

and the Idaho Supreme Court (Pet. App. 3a-8a, 30a-36a, 101a-106a).

The opinion and judgment of the Supreme Court of Idaho were issued on December 22, 1988. A timely petition for rehearing was denied on April 19, 1989 (*id.* 165a-166a). On July 12, 1989, Justice O'Connor entered an order extending the time for filing a petition for certiorari to August 17, 1989 (*id.* 167a), and on August 9, 1989, Justice O'Connor entered an order further extending the time for filing a petition for certiorari to August 24, 1989 (*id.* 168a). The petition for certiorari was filed August 24, 1989, and was granted January 8, 1990.

STATUTORY PROVISIONS INVOLVED

Section 9(a) of the National Labor Relations Act of 1935, as amended ("NLRA"), 29 U.S.C. § 159(a), provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

Section 301(a) of the Labor Management Relations Act of 1947, as amended ("LMRA"), 29 U.S.C. § 185(a), provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The Sunshine Mining Company operates a silver mine in Kellogg, Idaho, known as the Sunshine Mine. The United Steelworkers of America, AFL-CIO-CLC ("the union") is the exclusive bargaining representative of miners working in that mine.[2]

Article IX of the collective bargaining agreement between the company and the union covers the subject of "Safety and Health." No other provision of the agreement addresses that subject.

Article IX, at all relevant times (J.A. 20-22), began by defining the employer's responsibility for the safety and health of its employees: "The Company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment" (*id.* 20). Article IX went on to provide for a safety committee composed of six members, three designated by the employer and three designated by the union.

The agreement stated that the safety committee's authority was to submit "advices," "suggestions [and] recommendations" to the plant manager "for his consideration and for such action as he may consider consistent with the Company's responsibility to provide for the safety and health of its employees . . ." (*id.* 21-22); nothing in the agreement empowered the committee to take any corrective action. On these matters, the union had recourse to the agreement's grievance procedure if and only if a majority of the "entire" safety committee

[2] The trial court disposed of this case on a motion for summary judgment. The Idaho rules of procedure define the grounds for summary judgment in terms identical to Rule 56 of the Federal Rules of Civil Procedure. This statement of the case therefore summarizes the *undisputed* facts that were presented to the trial court for the decision on that motion.

(necessarily including at least one management member) had concurred in a recommendation with respect to a condition that "need[ed] action immediately" and that recommendation had not been carried out (*id.* 22. *See also id.* 93-94).

A union member of the committee was permitted to "accompany" the state mine inspector on any state inspection made at the property (*id.* 22). The union was also permitted to designate a representative to "accompany" the company's safety engineer once each month on "a tour of a section of the mine" (*id.*).

Pursuant to these provisions of the collective bargaining agreement, the union appointed three rank-and-file members—employees of the company—to serve on the joint safety committee along with representatives named by the company (*id.* at 179-180). The local union president testified that he did not expect rank-and-file miners to be able to "make investigations to determine what conditions in the mine might be unsafe or dangerous"; instead, he expected them to "represent the employees for bitches about safety" (*id.* 36-37. *See also* id. 98-99, 103, 179-180). As the agreement authorized, a union representative regularly accompanied the state mine inspector when he came to the mine to make the inspections that were mandated by Idaho law (*id.* 30, 36). One of the union representatives also accompanied the company's safety engineer each month on a tour of a section of the mine that the safety engineer designated (*id.* 34-36, 41, 215). The safety committee met regularly, as the contract provided, to discuss what had occurred on these tours and to offer suggestions about safety concerns (*id.* 36, 200-202, 205).

The local union president testified that "[t]he function of the Safety Committee was to convey employees' concerns to the company" (*id.* 104). To that end, the union's representatives on the committee were available to the employees to receive complaints and take them up with

management in the committee's meetings or between meetings (*id.* 95-104, 119, 208-210, 212-216).[3] Sunshine's management always reserved its right to decide whether to adopt the union representatives' suggestions, and cost was a major factor in its decisions (*id.* 39, 200-206).

On May 2, 1972, a major fire occurred underground in the Sunshine Mine. Ninety-one miners died from asphyxiation or carbon monoxide poisoning. After a thorough investigation, the United States Bureau of Mines could not make a definitive determination about the cause of the fire, but concluded that the most likely cause was spontaneous combustion of timbers and debris in an area that had long before been worked out and walled off from the rest of the mine.

The families of the deceased miners collected worker's compensation payments from the company under Idaho law. A number of the families then filed suit seeking damages from various third parties, including the United States Bureau of Mines and the manufacturers of certain materials and equipment that had been used in the mine. *See House v. Mine Safety Appliances Co.*, 573 F.2d 609 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978). Four of the miners' families filed another suit against the union in the state courts of Idaho, thus initiating the proceeding that is the subject of this petition.[4]

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[3] Other union officials, such as the local union president, also regularly discussed safety concerns with management (J.A. 92-93, 100-103).

[4] The four plaintiffs, all widows of deceased miners or guardians of minor children of deceased miners, sued variously in their individual capacities and on behalf of the children. The capacity in which each plaintiff sued is identified in the caption.

These families also sued the State of Idaho in this case under the Idaho Tort Claims Act, alleging that the state's mine inspectors had negligently failed to identify the hazards that caused the fire and contributed to the deaths of the miners. Those claims were dismissed in earlier proceedings in this case (Pet. App. 117a-154a).

The sole basis for plaintiffs' claims against the union was alleged negligence in administering and enforcing the safety article of the collective bargaining agreement.[5] The complaint alleged that the union "owed the Plaintiffs' decedents the duty of due care under Idaho law" (J.A. 53). Then, in specific terms, the complaint alleged that the union

> undertook to act as accident prevention representative and enforcer of the Company-Union agreement and did it negligently, to wit:
>
> A. It misrepresented its safety concern and expertise to the rank and file.[6]
>
> B. It failed to develop adequate program for its union representatives.
>
> C. It undertook to provide representatives who inspected and pretended to enforce the contractual accident prevention clauses, and did so negligently, to wit:
>
> (1) It failed to require mine evacuation on first evidence of smoke underground;
>
> (2) It failed to require fire drills;
>
> (3) It failed to require personal protective equipment;
>
> (4) It failed to require adequate protection against spontaneous combustion of discarded timbers underground;

---

[5] The original complaint alleged only a negligence claim; plaintiffs subsequently amended their complaint to assert a fraud claim as well, based on allegations that the union had falsely represented that it possessed expertise on safety matters and had thus lulled the miners into reliance on its safety "inspections." (J.A. 63-68). That claim was dismissed on grounds of state law. (Pet. App. 8a-9a, 16a-18a).

[6] The Idaho courts dismissed on state-law grounds the misrepresentation part of this claim, along with the plaintiffs' fraud claim. *See* note 5, *supra*.

(5) It failed to require adequate emergency egress from the mine.[7]

At an early stage of the proceedings, the union moved for dismissal or summary judgment on federal preemption grounds. In 1976 the Idaho trial court granted the motion for summary judgment (Pet. App. 164a). The court ruled that plaintiffs' claims were based entirely on alleged inadequacy in the union's performance as bargaining representative and that the federal duty of fair representation exclusively defined the terms on which a union could be held liable in that capacity. Accordingly, the trial court concluded that the union could not be held liable under state law negligence theories and dismissed the complaint (*id.* 163a-164a).

On appeal, the Supreme Court of Idaho reversed, holding that the duty of fair representation does not preempt state tort law (id. 108a-114a). A "special concurrence" (joined by three members of the five-member court) stated that "the precise nature of the legal issues raised by the appellants' wrongful death action is not entirely clear at the present procedural posture of the case," and "a final decision whether the wrongful death action against the respondent union is preempted by federal labor laws must therefore await a full factual development of the legal issues raised under our state tort law" (*id.* 155a-156a).[8] The union's petition for certiorari from that decision was denied. *United Steelworkers of America v. Dunbar*, 446 U.S. 983 (1980).

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[7] Complaint at 3-4. When plaintiffs subsequently amended their complaint, see note 5, *supra*, they restated these allegations in almost identical terms (J.A. 53-54).

[8] The Idaho Supreme Court's opinion is reproduced in full as Petition Appendix E. Most of that lengthy opinion is devoted to plaintiffs' claims against the State of Idaho. The portion of the majority opinion that addresses the claims against the union and the special concurring opinion on union liability appear at Pet. App. 109a-116a and 155a-156a, respectively.

On remand, after completion of extensive discovery in the trial court, the union again moved for summary judgment, arguing that on the undisputed facts, whether Idaho tort law or federal labor law governed, there was no ground for union liability. In 1983 the trial court granted that motion, holding that under Idaho tort law the union did not owe a duty of due care to employees on the matters alleged in the complaint (Pet. App. 97a-100a). As an alternative ground for decision, the trial court ruled that the Idaho claim was preempted by federal law because the summary judgment record made it clear that plaintiffs' negligence claims against the union were based solely on the union's "representational duties" and "the manner in which the Union carried out the collective bargaining agreement, [with plaintiffs] essentially saying the Union advisory committee should have done more" (*id.* 103a-104a).

On appeal, the Idaho Supreme Court reversed the district court's decision, once again reinstating plaintiffs' negligence claims (*id.* 15a-16a).[9]

First, in addressing the Idaho tort law issues, the Idaho Supreme Court observed that the basis for plaintiffs' assertion of a union duty was an allegation of negligence in the performance of safety functions that the union had undertaken pursuant to contract (*id.* 22a-23a). As to the source of the undertaking, the Idaho court stated that "[t]he Collective Bargaining Agreement provided for the Union's safety inspection function . . ." (*id.* 22a). The court quoted the entire safety article (*id.* 24a-28a). The Idaho court characterized the safety article of the contract as providing for union "inspections" of the mine and held that the union was under a duty to exercise due care when it performed that function:

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[9] The Idaho Supreme Court initially affirmed the trial court's judgment of dismissal on principles of Idaho tort law, without reaching the issue of federal preemption (*id.* 49a-55a). Plaintiffs then petitioned for rehearing, and the Idaho Supreme Court rendered the decision described in the text that follows.

> Because the Union, pursuant to the provisions of the collective bargaining agreement, had contracted to inspect and *in fact, inspected* the mine, it owed the (minimal) duty to its members to exercise due care in inspecting and in reporting the findings of its inspection. [*Id.* 29a, emphasis and parentheses in original].

Second, the Idaho court held that plaintiffs' tort claims were not preempted by federal labor law. The court rejected the union's argument that the federal duty of fair representation exclusively defines the grounds upon which a union can be held liable for its performance as bargaining representative (*id.* 30a-31a). Then the Idaho court rejected the union's argument that federal law in any event must govern the interpretation of the collective bargaining agreement, under this Court's decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). The Idaho court distinguished *Allis-Chalmers*, saying: "[I]n the instant case, the provisions of the collective bargaining agreement do not require interpretation, as was the case in *Allis-Chalmers*, *supra*, but rather *the provisions determine only the nature and scope of the Union's duty*" (Pet. App. 33a; emphasis added).

In concluding that federal law does not preempt plaintiffs' claims, the Idaho court relied heavily on the decision of the Eleventh Circuit which this Court later reversed in *Electrical Workers v. Hechler*, 481 U.S. 851 (1987). The Idaho Supreme Court quoted extensively from the Eleventh Circuit's *Hechler* opinion and stated that that opinion "correctly analyzed the non-applicability of the preemption doctrine to cases of this nature" (Pet. App. 34a), and concluded: "We agree with the *Hechler* analysis" (*id.* 36a).

The union petitioned for certiorari while *Hechler* was pending in this Court. After reversing the Eleventh Circuit's ruling in *Hechler*, this Court granted the union's petition, vacated the Idaho Supreme Court's judgment,

and remanded "for further consideration in light of" *Hechler*. 482 U.S. 901 (1987).

On remand, the Idaho Supreme Court "adhere[d] to [its prior] opinion as written" (Pet. App. 8a). However, that court no longer acknowledged, as it had prior to *Hechler*, that "the nature and scope of the Union's duty" were defined by the collective bargaining agreement (*id.* 33a). Instead, the Court changed its focus and held that the duty was not founded on the collective bargaining agreement but on what the union actually was doing:

> In the instant case we are not faced with looking at the Collective Bargaining Agreement to determine whether it imposes some new duty upon the union—rather it is conceded the union undertook to inspect and, thus, the issue is solely whether that inspection was negligently performed under traditional Idaho tort law.
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> • • • •
>
> In the instant case there is no need to look to the agreement to discern whether it placed an "implied duty" on the union or whether the duty "extended to the particular responsibilities alleged" because here the parties concede the union did actively undertake the subject inspection duties. [Pet. App. 5a-6a. *See also* 4a, 6a-8a].

Two justices dissented. Justice Bakes concluded that the duty of fair representation was "the only duty which the union owed to its members" in "pursuing the members' rights under the collective bargaining agreement to correct unsafe working conditions in the mine" (*id.* 11a). In reaching that conclusion he took strong issue with the majority's conclusory statement that the union had "conceded" that it undertook to inspect the mine:

> The union has never conceded that it undertook to inspect the Sunshine Mine. The Court's opinion does

not point to any pleading or any evidence in the record to sustain either its factual conclusion that the union undertook to inspect the mine, or its statement that the union has "conceded" that it undertook to inspect. There is absolutely nothing to support either of those two statements. [*Id.* 10a].

The other dissenter, Justice Johnson, concluded that *Hechler* "requires us to hold that there is pre-emption" (*id.* 11a).

> Except for any duty imposed by the collective bargaining agreement, the Union had no duty for the safety of its members. The existence of this duty and its nature and scope are dependent on the meaning of the collective bargaining agreement. In *Rawson I* this Court said that "the provisions of the collective bargaining agreement . . . determine . . . the nature and scope of the Union's duty." [111 Idaho] at 640, 726 P.2d at 752 [Pet. App. 33a]. I agree and for this reason would hold that *Hechler* applied.
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> Here, I am unable to see how a court could ascertain the duty of the Union without determining the meaning of the collective bargaining agreement. This would require the interpretation or construction of the collective bargaining agreement. [*Id.* 12a].[10]

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[10] Although the judgment of the Idaho Supreme Court contemplates further proceedings in the trial court, it is final within the meaning of 28 U.S.C. § 1257(a) because "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-483 (1975). *See also id.* at 485-486; *Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964). *See infra* at 25-27, 31.

SUMMARY OF ARGUMENT

I.

The union negotiated a collective bargaining provision giving it the right to "accompany" company and state inspectors on inspections of the mine, and subsequently exercised that right. The Supreme Court of Idaho ruled that solely by the exercise of that right the union assumed the affirmative duty "to exercise due care in *inspecting* the mine and in reporting the findings of its inspection" (Pet. App. 29a, emphasis added). The Idaho court was explicit that its ruling made the union answerable in tort for safety hazards that "could have been observed and should have been observed in the course of a reasonable inspection" (Pet. App. 28a). The issue here is whether a claim against the union based on that state law duty is preempted by the federal duty of fair representation.

In *Vaca v. Sipes*, 386 U.S. 171 (1967), this Court held that the federal duty of fair representation preempts the imposition of state law duties on a union's performance of representational functions in connection with the processing of grievances. For purposes of the preemptive effect of the duty of fair representation, the representational activity in this case stands on the same footing as the representational activity in *Vaca*.

Here the representational activity involves the administration of the contractual right to observe inspections and to make suggestions to the employer as to how to deal with matters that may affect safety. This activity is well within the area covered by the duty of fair representation. And the same reasons that require preemption as to union representational functions in administering the grievance article in a collective bargaining agreement apply to union representational functions in administering the safety article of such an agreement.

To impose state law duties on the union's performance of such functions would upset the "careful balance of individual and collective interests," *Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979), that the federal duty of fair representation is designed to preserve. Such state law duties would narrow the "wide range of reasonableness" federal law accords to unions, *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), by requiring unions to take certain actions or to meet a standard that is more demanding than the federal standard in performing representational functions, and thus would impinge upon the national labor policy.

When a federal law strikes a particular balance between competing interests, the states are not free to rebalance those interests if to do so would frustrate the federal objective. In this context, as in the *Vaca* context, the application of state tort duties to the union representational function would interfere with the collective bargaining process that Congress established. Accordingly, plaintiffs' state tort claims are preempted by the federal duty of fair representation.

II.

Section 301 of the LMRA governs the question whether the union in the safety article of the collective bargaining agreement assumed a duty to its members to inspect the mine. On its face the provision reads as an agreement by the company to a limited mechanism through which the union could raise safety issues on behalf of its members. And that reading is confirmed by reference to the policies and realities that form the context for assessing a collective bargaining agreement.

In negotiating a collective bargaining agreement, the union acts as the agent of the members of the bargaining unit and, as such, bargains to obtain commitments from the employer that run to the benefit of those employees. Ordinarily there is no occasion in a collective bargaining agreement for a union to make commitments to those on

whose behalf it is negotiating. There is nothing here which takes this safety provision out of the mainstream.

The office of "[c]ollective bargaining agreements [is to] regulate or restrict the exercise of management functions; they do not oust management from the performance of them." *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 583 (1960). The safety provision at issue here must be viewed in this light. The union sought to limit the company's prerogatives with respect to safety; the company yielded to the extent of providing for a limited forum for the union to bring employees' safety concerns to management's attention on an ongoing basis. That is the natural reading of the safety article, and that is the reading that results from an understanding of our system of labor relations.

ARGUMENT

I. THE DUTY OF FAIR REPRESENTATION ISSUE

The issue here is framed by the essentials of the relationship between an employer and a union in our collective bargaining system. The employer owns and operates the business. That being so, the employer, among other responsibilities, has a general duty to provide a safe workplace for the employees.[11] For its part, the union has the opportunity to persuade the employer, though discussion and the use of lawful economic weapons, to act in ways that improve workplace safety (as well as other terms and conditions of employment).

Here, the union played its role with respect to workplace safety by negotiating a contract clause providing, first, that a union member could "accompany" the company engineer or the state inspector on inspections of

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[11] *See Electrical Workers v. Hechler*, 481 U.S. 851, 859 (1987). The Idaho Supreme Court did not purport to place such a duty on the union here. In the words of that court, "we are not concerned with imposing a duty on the Union to provide a safe work place" (Pet. App. 4a).

the mine and, second, that safety "recommendations" to management could be made through a joint labor-management safety committee.

The union actively exercised these contractual rights. The Supreme Court of Idaho, in its most recent opinion—its opinion issued after this Court's decision in *Electrical Workers v. Hechler*, *supra*—ruled that solely by the act of "accompanying" company and state inspectors on inspections of the mine, the union assumed the affirmative duty "to exercise due care in *inspecting* the mine and in reporting the findings of its inspection" (Pet. App. 29a, emphasis added).[12] The Idaho court was explicit that its ruling made the union answerable in tort for safety hazards that "could have been observed and should have been observed in the course of a reasonable inspection" (Pet. App. 28a).[13] And the Idaho court held that the federal duty of fair representation does not preempt this state tort duty.

The issue thus raised concerns the source, and the substance, of the public law rules that govern the performance of a union that has the status of an exclusive bargaining representative under the National Labor Relations Act in carrying out a particular representational activity: *viz.*, administering a health and safety provision in a collective bargaining agreement.

In form, the question is whether only the federal duty of fair representation governs in this regard or whether both that duty and state tort law govern.

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[12] The quoted passage was taken from the Idaho Supreme Court's opinion in September 1986, prior to *Hechler*. As noted above, however, after *Hechler* the Idaho Supreme Court considered petitioners' arguments based on *Hechler* and announced: "We . . . adhere to our opinion as written " (Pet. App. 8a). Thus the pre-*Hechler* opinion and the post-*Hechler* opinion together constitute that court's explanation of its decision.

[13] *See* note 12, *supra*.

In substance, the question is whether the union's performance of its representational task is to be judged according to the standard repeatedly stated by this Court—"to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct," *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)—or by the myriad of state formulations of the law of negligence. That is a question of substance because, as the decision of the Idaho court reflects, in any given state the general tort law may well place greater burdens and restrictions on a union's exercise of representational functions than those placed on a union by the federal duty of fair representation.

We show first that *Vaca v. Sipes*, *supra*, squarely decided the question posed here in favor of federal preemption of state law with regard to another aspect of union representational activity—the handling of contract grievances. We then show that *Vaca* states the correct preemption rule across the full breadth of a union's responsibilities in determining how to negotiate and administer collective bargaining agreements, including health and safety provisions in such agreements. And finally we show that in this case preemption of plaintiffs' state tort claims by the duty of fair representation is dispositive of those claims.

A. This Court's decision in *Vaca v. Sipes* leaves no room for the application of state law duties to judge the legal adequacy of a union's performance of its representational functions in the context of the grievance-arbitration process. In *Vaca*, the plaintiff brought a state law action against a union alleging that the union had wrongfully failed to take his discharge case to arbitration. The Court ruled that the plaintiff's claim was preempted by the federal duty of fair representation on the ground that in applying state law "the Supreme Court of Missouri . . . applied a standard that is inconsistent with governing principles of federal law with respect to

the Union's duty to an individual employee in its processing of grievances under the collective bargaining agreement." 386 U.S. at 189. Thus, as regards this aspect of a union's representational function, the federal duty governs, and the states are not free to impose some other duty. And, as we proceed to demonstrate, this preemption ruling of *Vaca* is equally applicable to the other aspects of a union's representational role.

B. 1. When employees exercise their NLRA right to be represented by an exclusive bargaining representative and to negotiate a collective bargaining agreement through that representative, the employees start from the following reality:

> Management hires and fires, pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement, it may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditions. [*Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 583 (1960).]

The office of "[c]ollective bargaining agreements [is to] regulate or restrict the exercise of management functions; they do not oust management from the performance of them." *Id.* During the contract's term, the union monitors management's performance of its contractual commitments and generally attempts to assure that management abides by those commitments.

Normally the union performs that function by processing grievances that claim management violations of the contract through an agreed-on system for final resolution. That, of course, was the context in which *Vaca* arose.

But the contract may provide a lesser—but still useful—form of review and potential redress of management actions. As here, the agreement may expressly grant the union a means to advise management on how to exercise management functions but *not* grant a right to require

management to act in any particular way. That, as we have seen, *supra*, pp. 4-6, is the context in which this case arises: the union has been granted the right to observe inspections and a forum to make suggestions to the employer as to how to deal with matters that may affect safety.

The duty of fair representation is equally applicable to this form of union representational activity and to the representational activity at issue in *Vaca*. Earlier this Term, this Court reiterated that the duty of fair representation applies not only to the processing of grievances but to the full range of a union's activities in negotiating, administering and enforcing collective bargaining agreements. *Breininger v. Sheet Metal Workers Local 6*, —— U.S. ——, 110 S. Ct. 424, 437 (1989); *see also Electrical Workers v. Foust*, 442 U.S. 42, 46 (1979); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976); *Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Conley v. Gibson*, 355 U.S. 41, 46 (1957).

Of particular pertinence here, the *Breininger* Court stated: "The key is that the union is administering a provision of the contract, something we have always held is subject to the duty of fair representation." 110 S. Ct. at 437. Accordingly, the duty of fair representation applies just as clearly to the representational activity here at issue as to that in *Vaca*.

From the earliest days of the NLRA, moreover, this Court has recognized that Congress in enacting the NLRA intended to occupy the field of labor relations in and affecting interstate commerce. Thus, the national labor policy has a powerful preemptive effect on state law. As the Court stated in its seminal opinion in *San Diego Unions v. Garmon*, 359 U.S. 236, 244 (1959):

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state

> jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

This basic labor law preemption rule has, of course, been refined in numerous ways in the ensuing years. But *Garmon*'s recognition that it is federal law that governs the essentials of the collective bargaining relationship--and that where there is a substantial likelihood that state law will limit peaceful conduct affirmatively protected by the NLRA or affirmatively left unregulated by the Act, the state law must give way—remains unchanged. *Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132 (1976). And it is indisputable in this regard that the negotiation and administration of collective bargaining agreements is at the very heart of the federal enactment.

Thus, if there is any difference between *Vaca* and this case, it can only be that there are reasons for federal preemption in the grievance-arbitration context that are not at play in the present context where the union is administering a safety clause. We therefore turn to an inquiry as to whether that is so by examining the origin of, and the policies embodied in, the fair representation duty.

2. The collective bargaining system established by Congress is premised on the principle of collective action. A union chosen by a majority in an appropriate bargaining unit serves as the exclusive bargaining representative of all of the members of the bargaining unit. *E.g., Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 61-62 (1975).

This Court has found the duty of fair representation to be implicit in the statutory scheme that establishes this system of collective representation. The duty serves to protect against *abuse* by unions of their position as exclusive representatives.

> The duty of fair representation exists because it is the policy of the National Labor Relations Act to allow a single labor organization to represent collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative. In such a system, if individual employees are not to be deprived of all effective means of protecting their own interests, it must be the duty of the representative organization "to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." [*DelCostello v. Teamsters*, 462 U.S. 151, 165 n.14 (1983), *quoting Vaca v. Sipes*, 386 U.S. at 182.]

Given the source of the fair representation duty, "[m]ost fair representation cases require great sensitivity to the tradeoffs between the interests of the bargaining unit as a whole and the rights of individuals." *Breininger v. Sheet Metal Workers Local 6*, 110 S.Ct. at 431. The duty of fair representation, in other words, strikes a "careful balance of individual and collective interests." *Electrical Workers v. Foust*, 442 U.S. at 48.

The collective interests that weigh in this balance are those guaranteed by § 7 of the NLRA: "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

These collective rights "are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining.'" *Emporium Capwell*, 420 U.S. at 62. In *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. at 180, the Court explained:

> National labor policy has been built on the premise that by pooling their economic strength and act-

> ing through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. . . ." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202. . . . "The majority-rule concept is today unquestionably at the center of our federal labor policy." [Footnotes omitted.]

Precisely because the duty of fair representation is derived from a "federal labor policy" in which the "majority rule concept is . . . unquestionably at the center," *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. at 180, the duty has been developed to take account of the inherently difficult choices that a democratically elected representative must make and the wide area of discretion that such a representative must have in making those choices—so long as that discretion is exercised with honesty of purpose.

This Court has thus repeatedly emphasized in applying the duty that "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). *See also, e.g., Electrical Workers v. Foust*, 442 U.S. at 48-52; *Vaca v. Sipes*, 386 U.S. at 190-195; *Humphrey v. Moore*, 375 U.S. at 349-350.

To introduce additional state law duties into this calculus necessarily would upset the "careful balance of individual and collective interests," *Electrical Workers v. Foust*, 442 U.S. at 48, that the federal duty of fair

representation is designed to preserve. State law requirements that cut back on the "wide range of reasonableness" protected by the federal law by requiring unions to take actions in carrying out their representational functions that federal law does not require—or to meet a standard that is different from the federal standard—would necessarily narrow the range of choices available to the collective representative and thus impinge upon the national labor policy.

Like other entities, a union must deploy finite resources to achieve an all but infinite number of objectives. And like other representative entities, a union must accommodate competing claims asserted by its constituents. Each union must make difficult choices as to the resources to be devoted to such varied goals as assuring that employees and retirees receive the health and retirement benefits to which they are entitled, eliminating racially discriminatory practices of the employer, eliminating health and safety hazards, assuring that promotions, transfers and layoffs are made on a fair and proper basis, and so on. Such choices must be made both in determining the union's negotiating goals and in determining the union's contract enforcement priorities.

As we have seen, the national labor policy provides that these choices are to be made through the union's democratic processes and are to stand so long as the process is not corrupted by invidious considerations and so long as the decision is not arbitrary. But the state law of torts does not rest on the considerations that inform the duty of fair representation and thus, not surprisingly, the state tort rules are quite different from the federal rules.

The instant case illustrates the point. The union here made the following choices in determining how to implement the contractual right the union had obtained "to accompany" the company engineer and state inspectors on tours and inspections of the mine: rather than at-

tempting to duplicate the expertise of the company and state inspectors, the union decided to use the presence of a union member on these inspections as a channel of communication through which employees would feel free to voice their safety-related concerns to the inspectors and to management. *See* pp. 5-6, *supra*.

The choices the union made are not the only possible ones but are certainly well within the "wide range of reasonableness" that federal law intends unions to exercise in setting and pursuing the employee group's priorities. Yet under the state tort standard articulated by the Supreme Court of Idaho, those choices as to how best to deploy the union's resources in the performance of representational functions could subject the union to liability for injuries suffered as a result of safety hazards in the employer's work place. Thus, according to the Idaho Court, solely because union representatives accompanied company and state mine inspectors on inspections of the mine, the union would be responsible for safety hazards that "could have been observed, and should have been observed, in the course of a reasonable inspection" (Pet. App. 28a); and that court defined a "reasonable inspection" as an inspection "conducted in a reasonable and prudent manner in accordance with recognized standards" (*id.* at 29a).

As a practical matter, the state tort duty as thus defined would deprive the union of the option it chose as to how best to use the contractual opportunity to "accompany" company and state inspectors on inspections of the mine. Faced with that tort duty, either the union would have to take the steps necessary to conduct its own inspections of the mine in accordance with the standards state law sets for conducting such inspections—which the contract does not grant the union the right to do—or the union would have to forgo any participation in the inspections; and the union would have to do so even though the union and its members regard that more limited participation in the inspection process to be more valuable

han not participating at all. *Compare Vaca v. Sipes*, 386 J.S. at 192-193.

When the federal law strikes a particular balance beween competing interests, the states are not free to e-balance those interests if to do so would frustrate the ederal objective. *Teamsters Union v. Morton*, 377 U.S. 52, 259-260 (1964); *Vaca v. Sipes*, 386 U.S. at 192-193; *Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 32, 145-147 (1976); *see also Motor Coach Employees . Lockridge*, 403 U.S. at 286. Here, as was true in the *Vaca* context, the application of state tort duties to the nion representational function—in this case, administering the collective bargaining agreement's safety article —would interfere with the collective bargaining process hat Congress established. Accordingly, such applications f state tort law must be preempted.

C. We have just shown that plaintiffs' state tort laims are preempted by the duty of fair representation. n the circumstances here, that showing is dispositive of hose claims.

Plaintiffs have never pleaded a breach of the federal uty of fair representation in this case. Even after a comlete round of appeals to the Supreme Court of Idaho in hich the union argued that plaintiffs' state law claims re preempted by the duty of fair representation, plaintiffs amended their complaint and asserted as the *sole* basis or their claim: "The Defendant owed the Plaintiffs' deedents the duty of due care under Idaho law" (J.A. 53). nd plaintiffs pleaded only the elements of a negligence laim under Idaho law (*id.* 53-54); plaintiffs did not plead he elements of a fair representation claim as defined by his Court. In all subsequent proceedings in the trial ourt and on appeal from the summary judgment that as granted to the union, plaintiffs have steadfastly dis-

claimed any reliance on the duty of fair representation as a possible basis for their claim.[14]

A claim based on the federal duty is also unavailable to plaintiffs for reasons that go beyond plaintiffs' failure to plead or pursue that claim. The record evidence that has been developed over the seventeen years this case has been in litigation provides no basis for a claim that the union breached the duty of fair representation.

"A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. at 190. *See also Hines v. Anchor Motor Freight*, 424 U.S. at 564; *Breininger v. Sheet Metal Workers Local 6*, 110 S.Ct. at 436. The standard is meant to distinguish "between honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment, on the other . . . ." *Motor Coach Employees v. Lockridge*, 403 U.S. at 301.

In applying this standard, this Court has made clear that the duty of fair representation does not require a union to make full use of or to pursue all available avenues of relief established under a collective bargaining agreement, as long as the union is not improperly motivated. Most particularly, this Court has held that a union may, without violating the duty, refuse to file an employee's grievance—even a meritorious grievance—or refuse to take a grievance to arbitration. *Barrentine v.*

[14] For example, in their brief to the Idaho district court, plaintiffs said: "Plaintiffs, here, have alleged no breach of federal law. The claimed breach is of state law." Mem. in Opposition to Defendant's Motion for Summary Judgment, at 117-118 (Sept. 12, 1983). To the Idaho Supreme Court, on appeal, plaintiffs said: "The Appellants have never alleged that the Respondent Union breached its duty of fair representation, nor have the Appellants ever contended that federal law should apply." Appellants' Reply Brief in Idaho Supreme Court Case 15338, at 6.

Arkansas-Best Freight System, 450 U.S. 728, 742 (1981); *Vaca v. Sipes*, 386 U.S. at 194-195.

In the instant case, there is no evidence that the union's conduct in connection with company and state mine inspections was "arbitrary, discriminatory, or in bad faith." To the contrary, as we have discussed, the evidence is that the union chose to use its participation in the inspections largely as a means for receiving and transmitting safety complaints from employees in the various sectors of the mine visited during the inspections, rather than attempt to duplicate the expertise in mine safety that the company and state inspectors brought to the inspections. *See supra* at 4-6.

The making of such choices is the essence of the union's representative function; the particular choices made here are perfectly consistent with the duty of fair representation.

II. THE SECTION 301 ISSUE

Putting the foregoing considerations aside, and looking at plaintiffs' tort claim on its merits, that claim depends on the union having a duty to inspect. Under Idaho law, as under the common law generally, in the absence of such a duty a union, or any other person, has no obligation to discover or to report hazardous conditions on another's property. *See generally* Restatement (Second) of Torts §§ 314, 323, 324A (1965).

Until *Hechler* was decided, both plaintiffs and the Supreme Court of Idaho located the source of the union's duty to inspect in the safety article of the collective bargaining agreement.[15] After *Hechler*, as we understand

[15] *Hechler*, of course, made crystal clear both (a) that the interpretation of collective bargaining agreements is exclusively a question of federal law under § 301—"law 'which the courts must fashion from the policy of our national labor laws,'" 481 U.S. at 855, *quoting Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957);

matters, both plaintiffs and the Idaho court would locate the source of the union's duty to inspect in the union's action of accompanying company and state inspectors on inspections of the mine, and not in any contractual agreement by the union to inspect. *See supra* at 11.

We cannot state with assurance, however, that both plaintiffs and the Idaho court have given up all reliance on the claim that the union's "duty to inspect" is grounded in the contract. Out of an abundance of caution we therefore show briefly that the union did not enter into any such agreement. In doing so, we apply the principles for interpreting collective bargaining agreements that are applicable under § 301 of the LMRA. See *supra*, note 15.

The place to begin is the language of the safety article of the collective bargaining agreement—the only provision in that agreement regarding safety. We have already described the safety article in great detail, *see supra*

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and (b) that a union in a collective bargaining agreement may agree to assume duties to the employees the union represents that are in addition to the duty of fair representation that inheres in its representative status, 481 U.S. at 860-862. The existence and the scope of such a commitment by the union is, of course, like the rest of the collective agreement, to be determined according to federal law under § 301, *id.* at 862.

[16] In their post-*Hechler* brief to the Idaho Supreme Court, plaintiffs argued as follows:

> The Union's duties exist not because the Union, pursuant to the provisions of the Collective Bargaining Agreement had contracted to inspect, but because of the conduct of the Union by *in fact* inspecting the mine and the duty it owed its members to exercise due care in inspecting and reporting its findings and recommendations.
>
> * * *
>
> The *actions* of the Union establish the nature of [*sic*] scope of their duties; the *contract* does not.

Appellants' Supplemental Brief, in Idaho Supreme Court Case No. 15338, at 2, 10 (emphasis in original).

at 4-5. We repeat here only the following: The provision permitted the union to designate a representative "to accompany" the company's safety engineer on his monthly "tour of a section of the mine" and "to accompany" the state mine inspector on any state inspection of the mine (J.A. 22). The provision did not grant the union any authority to change safety practices or to correct hazards in the mine; rather, the contract only went so far as to authorize union representatives—through an evenly divided six-person joint labor-management safety committee—to submit "advices," "suggestions [and] recommendations" to the plant manager "for his consideration and for such action as he may consider consistent with the Company's responsibility to provide for the safety and health of its employees . . ." (*id.* 21-22). Indeed, under the collective bargaining agreement the union did not even have recourse to the grievance procedure on those matters unless at least one management member of the safety committee supported the union's position as to a safety recommendation that "need[ed] action immediately" (*id.* 22).

On its face, the provision reads as an agreement by the company to a limited mechanism through which the union could raise safety issues on behalf of the bargaining unit members for the company's consideration. There is no suggestion of an independent union right or duty to inspect the mine.

That this provision should be understood as a limited commitment by the company to the union, and not a commitment by the union to the bargaining unit members, is confirmed by reference to the policies and realities of our system of collective bargaining. As this Court has stated:

> In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective

> bargaining agreements are negotiated and the purpose which they are intended to serve. [*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960)].

For purposes here, the most germane consideration is the nature of the relationship between the union and the bargaining unit members. In negotiating a collective bargaining agreement, the union acts as the agent of the members of the bargaining unit. In that agency role, the union's objective is to obtain commitments from the employer that run to the benefit of the represented employees. To obtain those commitments, the union may have to make commitments *to the employer* on behalf of the represented employees—for example, a no-strike commitment. But ordinarily, there is no occasion in a collective bargaining agreement for a union to make commitments to the bargaining unit members themselves on whose very behalf the agreement is negotiated. And there is nothing here that takes this safety provision out of the mainstream and manifests a commitment by the union *to its members* to make mine inspections.

As we noted earlier in this brief, the office of "[c]ollective bargaining agreements [is to] regulate or restrict the exercise of management functions; they do not oust management from the performance of them." *Steelworkers v. Warrior & Gulf*, 363 U.S. at 583. The safety provision at issue here must be viewed in this light. The union sought to limit the company's prerogatives with respect to safety; the company yielded to the extent of providing for a limited forum for the union to bring employees' safety concerns to management's attention on an ongoing basis. That is the natural reading of the safety article, and that is the reading that results from an understanding of our system of labor relations.

Based on the same analysis, the Sixth Circuit in *Bryant v. United Mine Workers*, 467 F.2d 1, 4-5 (6th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973), held that a collective bargaining agreement, which gave the union greater

power over safety matters than the agreement at issue here, was not intended to create rights enforceable against the union by employees:

> Sub-sections (a) and (b) read together give the Union the power to compel compliance; nothing in the language of those sub-sections seems to require the Union to exercise such power. Collective bargaining agreements are literally agreements between unions and employers; the Union negotiators are intent on gaining the maximum power possible from management negotiators. Whether or not they choose to exercise all the power gained depends on a variety of situations relating to the overall employment situation in the industry. It would be a mistake of vast proportion to read every power granted the union by management as creating a corollary contract right in the employee as against the union.

The application of federal principles, as § 301 requires, thus compels the conclusion that the safety article of this collective bargaining agreement did not create any contractual duty that could serve as the basis for plaintiffs' suit.

CONCLUSION

For the foregoing reasons, the decision and judgment of the Supreme Court of Idaho should be reversed.

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In The

Supreme Court of the United States

October Term, 1989

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioner,

v.

THARON RAWSON, Individually and as Guardian Ad Litem for SETH RAWSON and CINDY RAWSON; BERNEICE JOHNSON, Individually and as Guardian Ad Litem for MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON and JOHN RUSSEL JOHNSON; LAURA DUNBAR, as Guardian ad Litem for RICKINA ROSSITER and GLEN ROSSITER, JR.; and MARY WOOD, as Guardian Ad Litem for LESLIE D. WOOD, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Idaho

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QUESTIONS PRESENTED

1. Under the principles applicable pursuant to § 301 of the Labor Management Relations Act, does the Act preempt the enforcement of duties arising under state law which are not dependent on interpretation of the CBA?

2. Does the federal duty of fair representation preempt a state negligence action that challenges a union's performance in conducting safety inspections where that duty arises under state law independent of the CBA?

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STATEMENT OF THE CASE

The Coeur d'Alene Mining District, located in Northern Idaho, contains a number of hard rock mines which extend 6,000 feet below the surface and contain up to 125 miles of underground tunnels and workings. (J.A. p. 29). On May 2, 1972, 91 miners lost their lives when a fire broke out in the Sunshine Mine, the largest producer of silver and antimony, located within the Coeur d'Alene Mining District. (Pet.App. p. 108a, 109a).

Prior to the mine fire, the Petitioner Union undertook inspection activities in the Sunshine Mine for the benefit of its members, conducted inspections of the mine, made recommendations to management with regard to safety problems and monitored that such recommendations were acted upon by the mine management. (J.A. pp. 212-216). The Union further undertook to provide information, instruction and guidance and training to its members (J.A. pp. 7-8), and followed up on the implementation of its procedures with the aim of improving member safety. (J.A. pp. 9-12).

As a result of the deaths of their husbands and fathers, the Respondents brought this action seeking damages arising out of the wrongful death of decedent mine workers pursuant to Idaho Code § 5-311.[1] Contrary to the

---

[1] §5-311. Action for wrongful death – When the death of a person . . . is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. . . .

position advanced by Petitioner, the basis for the Plaintiffs' claims against the Union is *not* the failure to properly administer and enforce the safety article of the Collective Bargaining Agreement (CBA). (Pet.Br., p. 7). The Respondents' claim is based upon the state law claim for negligence in the *conduct* of safety inspections.

On the initial appeal in *1979* the Idaho Supreme Court recognized that:

> An action for wrongful death is a creature of our state statutes, is of a substantial local interest, and traditionally has been committed to the jurisdiction of the Courts of the state. Moreover, this action for wrongful death is unlikely to present the identical legal issues as a proceeding under the federal labor laws arising from this same factual setting. (Pet.App. p. 155a).

The majority opinion further stated:

> We hold that a material issue remains in existence in the case at bar regarding whether the union had a duty to inspect and the alleged breach of duty.

The Court addressed the claim of preemption and held that the Plaintiffs' claims were not preempted by federal law. (Pet.App. pp. 109a-116a).

The Idaho Supreme Court then remanded to the trial court for further proceedings. The trial court after some additional discovery granted summary judgment for the Union on the negligence claim as well as holding the issue was preempted by federal law.

In February 1986, the Idaho Supreme Court, addressing the state law claim under Restatement (2nd) of Torts, § 323, reversed summary judgment on the negligence

claims which had been entered by the District Court. The Idaho Supreme Court held at that time that the Union:

> . . . did embark upon safety inspections and the issue is whether they negligently performed their undertaking, or whether the Union's negligent performance resulted in the men being subjected to increased hazards or potential for death on the date of the fire and explosion than would otherwise have been the situation had the inspections been performed without negligence. (Pet.App. p. 23a).

The Idaho Supreme Court further held that:

> The miners' cause is not premised on either a claim that the union should perform management safety functions or that the union should make the workplace safe – rather, the cause of action is premised upon the union negligently performing those safety functions which it did in fact undertake. (Pet.App. p. 23a).

The Idaho Court acknowledged that the record before them established that the safety committees were formed and that inspections were made and recommendations were made to the employer concerning mine safety. (Pet.App. 27a, 23a; 77a-87a; *see also* J.A. p. 212; p. 194; p. 179; p. 157, 158; p. 123, 124; p. 104; p. 95-97). The Idaho Court concluded:

> We cannot say as a matter of law that had the inspectors reported these blatant violations to the committee, with the committee in turn reporting them to management, that management would have corrected these defects – but neither was the trial court correct on summary judgment to resolve the factual issue any other way. Rather, such is an issue of proximate cause not properly resolved on summary judgment. The record is devoid of any opposing affidavits or

> deposition testimony that the inspections were, in fact, conducted in a reasonable and prudent manner in accordance with recognized standards. (Pet.App. 29a).

The Court concluded:

> Because the union, pursuant to the provisions of the collective bargaining agreement, had contracted to inspect and *in fact, inspected* the mine, it owed the (minimal) duty to its members to exercise due care in inspecting and in reporting the findings of its inspection. (Emphasis in Original). *Id.*

The Supreme Court again refused to find that Plaintiffs' claims were preempted by federal law. (Pet.App. pp. 30a-36a).

The Idaho Supreme Court in remanding the negligence claim for trial passed upon the sufficiency of the evidence necessary to withstand summary judgment and concluded that the matter should proceed to trial. The Court acknowledged the CBA and Union Constitution but clearly focused its decision on the facts in the record which supported the claims that the Union had "in fact inspected" the mine and that its duty of due care was to be tested on the basis of that undertaking. (Pet.App. p. 23a).

The Union has not denied nor does it deny in the present brief of Petitioner that it was not involved in safety inspections. The Union in fact concedes:

> A union member of the committee was permitted to accompany the state mine inspector on any state inspection made of the property. The union was also permitted to designate a representative to accompany the company's safety

> engineer once each month on a tour of the section of the mine. . . . The Union appointed three rank and file members . . . to serve on the joint safety committee. . .(Pet.Br. p. 5).
>
> . . . A union representative regularly accompanied the state mine inspector when he came to the mine to make the inspections that were mandated by Idaho law. One of the union representatives also accompanied the company safety engineer each month on a tour of a section of the mine that the safety engineer designated. The safety committee met regularly. . .to discuss what had occurred on these tours and to offer suggestions about safety concerns. (Pet.Br. p. 5).

There are several examples illustrated by the present record which establish that the Union engaged in safety related activities which were reported to management and in fact acted on by management. (J.A. pp. 212-216).

The Union recognized the significant economic and social impact that workplace injuries create, and further demonstrated its commitment to improving the safety of its members through aggressive safety and health programs. (Pet.App. 75a-88a). (J.A. pp. 157-158).

The record demonstrates that the Union undertook to perform inspections and make recommendations seeking to improve the safety for the miners. (J.A. pp. 212-216; pp. 95-97). The Union recognized that an essential part of its undertaking was to confront the company with safety hazards to seek their immediate removal. (J.A. p. 99; pp. 212-216).

While the Petitioner would argue for a factual determination by this Court regarding the adequacy of the inspections, the issues of reliance and reasonable care

have been remanded for trial by the Idaho Supreme Court after review of the adequacy of the record to support such questions of fact. That trial has not been held and the factual issues remain in dispute.

The Petitioner repeatedly attempts to cast the issue as "alleged negligence in administering and enforcing the safety article of the collective bargaining agreement." (Pet.Br. p. 7). Idaho is a notice pleading jurisdiction and the pleading sufficiency has withstood the Idaho Supreme Court's review. The Complaint, in its essential terms, states that the union "undertook to act as accident prevention representative . . . undertook to provide representatives who inspected . . . and did so negligently . . . " The sufficiency of the pleadings incorporating the answers to Interrogatories by Plaintiffs (J.A. p. 8-9) and discovery completed under the Idaho Rules of Civil Procedure, have passed the muster of the Idaho Supreme Court as alleging the requisite "negligent performance" of the undertaking.

There is no doubt that the state of the law in Idaho recognizes a wrongful death claim by the heirs who may proceed against one who undertakes to perform safety inspections and does so negligently. (Pet.App. 23a).

Contrary to the Petitioner's assertions, the Court has consistently addressed the focal issues of the negligence of the Union with regard to the *conduct* which was actually undertaken. (Pet.App. p. 23a).

The Idaho Supreme Court in 1988 on remand from Writ of Certiorari reaffirmed that the instant action did not depend upon an analysis of the bargaining agreement. The Court held:

> [I]n the instant case, no interpretation of the collective-bargaining agreement is required to determine whether the union member of the inspection team committed a tort when he committed various acts and omissions such as failure to note the self-rescuers were stored in boxes with padlocks or that the activating valves of the oxygen breathing apparatuses were corroded shut. Rather, such alleged acts of negligence are measured by state tort law.
>
> We therefore adhere to our opinion as written. (Pet.App. p. 8a).

The Idaho Supreme Court distinguished the instant case from cases where preemption was applied. The Court stated:

> In the instant case we are not concerned with imposing a duty on the union to provide a safe work place. Rather, the issue here is whether the LMRA preempted prosecution of a tort action where the activity was concededly undertaken and the standard of care is imposed by state law without reference to the collective bargaining agreement. (Pet.App. p. 4a).

The Petitioner charges that the Court "changed its focus and held the duty was not founded on the Collective Bargaining Agreement but on what the Union actually was doing." (Pet.Br. p. 11). Such is not the case. In its earlier February 1986 decision, the Idaho Supreme Court had stated that the cause of action was premised on the Union negligently performing those safety functions which it "did in fact" undertake. (Pet.App. p. 23a, p. 29a).

Although the Petitioner seeks to gain advantage from various references by the Idaho Supreme Court to the Collective Bargaining Agreement and to the Union Constitution, a fair reading of the opinions issued by the Idaho Supreme Court as they relate to the basis of the common law duty in Idaho, shows that the Idaho Supreme Court's reliance is and has been on the actual undertaking. In fact, under Idaho law non-feasance of a contract or the failure to perform a contract is not a basis for an action in tort. (*See* discussion re: *Taylor v. Herbold, infra.*, p. 12). The tort action recognized in Idaho arises out of the actual performance of certain conduct and the conduct thereafter becomes the focus of the nature and extent of the duty. (*See, Taylor v. Herbold, infra.*).

This case directly presents the issue of the right of a State to provide for the safety and welfare of its citizens by enforcing state law which, while it may arise contemporaneous with a contract, is not dependent upon interpretation of the contract for the determination of the nature and extent of the duties involved.

Of special concern is the suggestion made by Amicus Public Citizen, that the Respondents in this matter are simply reaching for the "deep pocket" or are otherwise seeking sympathy. (Amicus Public Citizen Brief at pp. 3, 5, 19). Such a contention is outrageous. For Public Citizen to maintain that Respondents' efforts to compel the accountability of the Union and seek to enforce their legal rights should in some way be held in disrepute because they claim money damages is unworthy of such an organization. Respondents are simply seeking to enforce duties owed them based upon the rights afforded by the State of Idaho through the Idaho Wrongful Death Statute.

The law of torts is the law of social accountability based upon sound economic principals that those compelled to pay for the losses they cause will endeavor to correct such behavior so the losses will not occur in the future.

SUMMARY OF ARGUMENT

The LMRA and the duty of fair representation do not address the right of heirs, under Idaho law, to proceed in a wrongful death action against a Union based upon its wrongful conduct. The Idaho Supreme Court is correct in recognizing that the state law rights enjoyed by the heirs are not dependent on the Union contract. Nor is the duty owed by the Union to the *heirs* of a Union member based on contract or the duty of fair representation.

The states, through their tort law, exercise inherent police powers over conduct and activities within the states. The management of such conduct is a significant force upon which states rely such as Idaho, which have a limited statutory body of law, to provide accountability and promote workplace safety. The states are ultimately responsible for the economic impact of welfare, unemployment and injury based compensation systems. These traditional state interests are a compelling basis upon which preemption should be avoided in most instances. *Metropolitan Life Insurance v. Massachusetts*, 471 U.S. 724, 85 L.Ed.2d 728, 105 S.Ct. 2380 (1985).

Under the principals set forth in the Court's recent decisions *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985); *Electrical Workers v. Hechler*, 481 U.S. 851 (1987); *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987); *Lingle v. Norge Div. of*

Magic Chef, Inc., 108 S.Ct. 1877 (1988), the established rules for federal preemption pursuant to §301 expressly allow these claims of Respondents to proceed under state law. These State law claims do not require interpretation of the terms of the Collective Bargaining Agreement. The claims do not require any reference to the Union contract nor are they inextricably intertwined. The Respondents' claims are based on what was *done not* what was *promised*.

Examination of the judicially developed doctrine of fair representation reveals that said duty does not preempt Respondents' state law claims. Respondents' claims do not involve the type of representational activity contemplated by the fair representation doctrine. Any preemption based upon fair representation would amount to unwarranted immunity for Union activity independent of contract interpretation or the declared intent of Congress.

Respondents' have no standing to pursue claims based upon contract violation under §301 or for claims under the duty of fair representation. Any determination that the federal claims preempt the state cause of action would cast the Respondents into a black hole of the law void of remedy and provide immunity to the Unions for claims by non-member dependents never contemplated by Congress.

ARGUMENT

I. RESPONDENTS' CLAIMS ARE NOT PREEMPTED BY THE LABOR MANAGEMENT RELATIONS ACT.

Respondents' wrongful death claims against the Petitioner Union are not preempted by §301 of the LMRA. Contrary to Petitioner's contention, Plaintiffs' claims do not depend on a duty found within the CBA. The "source" of the Union's duty is the *conduct* of the undertaking involving safety inspections. Idaho law has long recognized that a contract may create a situation for a tort and that a cause of action "will lie in tort for an act of misfeasance or malfeasance although a contractual relation may exist between the parties." *Wallace v. Hartford Fire Ins. Co.*, 31 Idaho 481, 174 P. 1009 (1918).

Under Idaho law there is a distinction between a failure to carry out a contract for inspection activities and the negligent performance in the conduct of inspections. These distinctions have been characterized as non-feasance versus misfeasance. The Idaho Supreme Court recognized this distinction in its Opinion issued in September of 1986 and in *Carroll v. United Steelworkers*, 107 Idaho 717, 692 P.2d 361 (1984). (Pet.App. 23a-24a). Liability for misfeasance of an undertaking is not new to Idaho law. It has long been recognized in Idaho that a failure to perform a contract would *not* give rise to tort liability, but a tort may arise independent of the contract based on the negligent performance of an undertaking. *Just's Inc., v. Arrington Const. Co.*, 99 Idaho 462, 583 P.2d 997 (1978); *McAlvin v. Gen. Ins. Co. of America*, 97 Idaho 777, 554 P.2d 955 (1976); *Taylor v. Herbold*, 94 Idaho 133,

483 P.2d 664 (1971); *Carroll v. United Steelworkers, supra*. In the *Herbold* case, for example, it was noted.

> A breach of contract is not in and of itself a tort. A contract may, however, create a situation which furnishes the occasion for a tort. When a person renders services to another pursuant to a contract or otherwise, the law imposes a duty of due care in the performance of those services.
>
> "The duty of due care arises . . . irrespective of contract," or "there must be a breach of duty apart from the non-performance of a contract." 94 Idaho at 138.

Under *Taylor v. Herbold*, if the Union had promised to inspect but had never done so, the Respondents would be left without a tort action. The Union's mere non-feasance in complying with the terms of the CBA would not give rise to a tort under Idaho law. Actions for breach of contract in Idaho may well involve an interpretation of what the Union had agreed to do under the Collective Bargaining Agreement. However, the instant action is one based upon misfeasance and cannot be based, in Idaho, on non-feasance. It is not necessary to look to the language of the Collective Bargaining Agreement but requires an examination of the actual *conduct* of the Union.

In fact, the contract provides no real guidance regarding the claims which the Respondents have made here. The Respondents claim, for example, that there was insufficient training in the use of the self-rescuers; there were too few self-rescuers located underground at critical locations; the self-rescuers were kept in locked boxes; the condition of the self-rescuers was such that they were rusted, corroded and unworkable. Some were eighteen (18) years old and had been kept well beyond their useful

shelf life of five (5) years. The contract says nothing about self-rescuers; how to inspect or when to inspect. The negligence was in the inspection which was performed, not in the application of contract terms. (See Pet.App. 28a and J.A. 81-84).

Respondents' claims do not rely on any terms provided under the CBA and do not directly or indirectly depend upon the content or conditions in said agreement.

Particularly, the CBA does not address the legal rights of the heirs. Federal Law has not preempted the Idaho law which provides for the rights of heirs who are not participants in the CBA. Idaho law specifically provides remedy to the *heirs* of one whose death is caused by the wrongful *act* of another. (I.C. § 5-311, fn. 1, p. 2). Idaho law further provides that one who conducts himself negligently in the performance of an *act*, regardless of the reason the action was undertaken, is accountable for the damage caused thereby. (Pet.App. pp. 18a-19a). (Restatement (2nd) of Torts, §§ 323 and 324A).

In *Allis-Chalmers Corp. v. Lueck, supra*, this Court recognized that all claims that a Union member may have are not founded in the Union contract. This Court has repeatedly held that the collective bargaining system exists coincident with numerous state and federal laws which regulate the substantive terms and conditions of employment and protect all employees, whether or not they are represented by a Union or covered by a Union contract.

The *Lueck* Court expressly limited §301 preemption to state law claims which depend on the violation of rights which are protected by the CBA. A state law which

creates rights independent of a collective bargaining Agreement does not undermine either the rights created by contract or the procedures established for resolving disputes which arise under the contract.

In *Lueck*, this Court held that an employee's claim of bad faith handling of a collectively bargained insurance policy was preempted by § 301 since tort application depended on the terms of the agreement. The Court concluded that to do so would evade congressional mandate that federal law must govern the meaning of contract terms. 471 U.S. at 218-219. The Court also reiterated the right of Unions and employers to have contract disputes resolved by a unified body of federal labor-contract law. *Id.* at 219-220. The claim in *Lueck*, however, was clearly dependent on what the contract provided.

This Court was careful to point out in Lueck the narrow parameters of its ruling:

> In extending the preemptive effect of § 301 beyond suits for breach of contract, *it would be inconsistent with Congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.* 471 U.S. at p. 212. (Emphasis added).

In the instant matter, Idaho law proscribes wrongful conduct and grants the right to the heirs to proceed against persons whose wrongful conduct results in death. The Idaho law protects citizens who are otherwise not protected by and do not have standing to complain under federal labor law. Such proscription of conduct (not contract) and establishment of right is clearly independent of the labor contract.

After *I.B.E.W. v. Hechler, supra,* and pursuant to this Court's direction, the Idaho Supreme Court addressed the analysis in *Hechler* and distinguished *Hechler* from the instant case. (Pet.App. pp. 4a-7a). The Respondent in *Hechler* had conceded that the "nature and scope of the duty of care owed [her] is determined by reference to the Collective Bargaining Agreement." 481 U.S. at 851, fn. 5. Footnote 5 of the *Hechler* opinion points out that it was in her brief to this Court that Respondent argued for the first time that her claim "was not dependent on an interpretation of the Collective Bargaining Agreement . . . " *Id.* This Court concluded that "it is too late in the day for Respondent to present to the Court this new found legal theory." *Id.* at 864.

As the Idaho Supreme Court noted:

> Thus, the instant case is clearly distinguishable from *Hechler* in that here the state tort basis of the action was not abandoned, but has been pursued consistently both at the trial and appellate levels and the tort exists *without reference to the Collective Bargaining Agreement.*
>
> Accordingly, *Hechler* is inapposite and does not stand for the proposition that a federal LMRA preemption exists in the instant case. (Pet.App. p. 7a) (Emphasis added)

This Court's language in *Hechler* supports the Idaho Court's analysis:

> Respondent's allegations of negligence assumes significance if – and only if – the Union, in fact, had assumed the duty of care that the complaint alleges the union breached. 481 U.S. at 861.

The *Hechler* decision confirms again that the key to preemption under § 301 depends on the need to interpret the Collective Bargaining Agreement. 481 U.S. at 858-859.

There exists no issue in the instant matter of the contractual obligations under the Collective Bargaining Agreement. Whether the Union complied or failed to comply with the terms of the Collective Bargaining Agreement is not the question in a determination of the Respondent's claims. The focus of the Respondent's state based tort action is upon the *actions* or *conduct* and whether the duty, once undertaken, was negligently performed. Respondent's wrongful death claims therefore do not rely upon nor are they "inextricably entertwined with consideration of the terms of the labor contract." *Allis-Chalmers v. Lueck*, 471 U.S. at 213.

A history of § 301 cases was provided by this Court in its decision in *Lingle v. Norge Div. of Magic Chef, Inc., supra*. In discussing the case of *Horton v. Miller Chemical Co.*, 776 F.2d 1351 (CA7 1985) (cert. denied), 475 U.S. 1122, 106 S.Ct. 1641, 980 L.Ed.2d 186 (1986), the Court noted:

> Each of these *purely factual questions* pertains to the *conduct* of the employee and the *conduct* and motivation of the employer. Neither of the elements requires a court to *interpret* any term of a collective bargaining agreement. 108 S.Ct. at 1882. (Emphasis supplied).
>
> Thus, the state law remedy in this case is "independent" of the collective bargaining agreement in the sense of "independent" that matters for § 301 preemption purposes: *Resolution of the state law claim does not require construing the collective bargaining agreement. Id.* (Emphasis supplied).

> [A]s long as the state law claim can be resolved without *interpreting* the agreement itself, the claim is "independent" of the agreement for § 301 preemption purposes. *Id.* at 1883. (Emphasis added).

The Court then specifically declared the distinction between federal and state functions respecting § 301 preemption:

> Today's decision should make clear that *interpretation* of collective bargaining agreements remains in the arbitral realm; judges can determine *state law* involving labor management relations only *if such questions do not require construing collective bargaining agreements.*
>
> Second, there is nothing novel about recognizing that substantive rights in the labor relations context can exist without *interpreting* collective bargaining agreements. *Id.* at 1884. (Emphasis added).

Again, the primary distinction that this Court expressed is that preemption depends on whether the CBA must be *interpreted* or *construed*; the Court restates this position at p. 1885 with accompanying footnote:

> In sum, we hold that an application of state law is preempted by § 301 of the Labor Management Relations Act of 1947 only if such application requires the *interpretation* of a collective bargaining agreement.[12]

---

[12] . . . Thus, as a general proposition, *a state law claim may depend* for its resolution *upon both the interpretation of a collective bargaining agreement and* a *separate state law* analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but *the separate*

> *state law analysis would not be thereby preempted.* As we said in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. at 211, 105 S.Ct. at 1911, "not every dispute . . . tangentially involving a provision of the col.. ctive bargaining agreement is preempted by § 301. *Id.* at 1985. (Emphasis added).

The Petitioner contends that it is necessary to interpret the Collective Bargaining Agreement in order to establish Respondent's claims. Petitioner has declared that provisions of the Collective Bargaining Agreement allowed Union designated representatives to "accompany" others on mine inspections and that the Union had authority only to give advice, suggestions and recommendations. (Pet.Br. p. 4-5). The Petitioner then concludes that provisions of the Collective Bargaining Agreement did not create a *contractual duty* to inspect and it therefore follows there can be no assumption of the duty to inspect under state law. The Petitioner continually attempts to cast the Respondents' claim in the image which Petitioner creates. The Petitioner's imagery does not, however, alter the Idaho law.[2]

---

[2] Restatement (2nd) of Torts

§ 323. Negligent Performance of Undertaking to Render Services. One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking. (Pet.App. p. 23a)

(Continued on following page)

For the purposes of the Respondents' state law claims, it is not important to determine *why* the Union was underground conducting inspections, nor is it important to determine what authority the Union had under the CBA. Under Idaho law, the actual undertaking and conducting of mine inspections, the reporting and reliance are the elements which define and give rise to the duty to carry out such inspections in a non-negligent fashion. Respondents do not assert that the Petitioner breached any contractual duty to inspect. Respondents assert that negligent performance in the conduct of inspecting is the nexus of the duty.

II. COMPELLING STATE INTERESTS MILITATE AGAINST PREEMPTION.

This Court in *Lueck* also restated the need to determine congressional intent before finding preemption and restated that Congress' intent is "the ultimate touchtone."

(Continued from previous page)

§ 324A. Liability to Third Person for Negligent Performance of Undertaking. One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking. (Pet.App. p. 58a, fn. 1)

471 U.S. at 208, quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

Given the strong feelings for state's rights within our federal system, there exists a strong presumption against the preemption of state laws. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1982); *See also, Calif. Fed. v. Guerra*, 107 S.Ct. 683, 689 (1987). This Court in *Commonwealth Edison Co. v. Montana* restated its frequent position:

> [p]reemption of state law by federal statute or regulation is not favored in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakingly so ordained. (Citation omitted). 453 U.S. at 634.

Congress' failure to provide any remedy for heirs of the decedents injured by such conduct, as demonstrated in this case, clearly militates for non-preemption.

> It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984); *see also, Construction Workers v. Laburnum Corp*, 347 U.S. 656, 663-664 (1954)

In contrast, the Idaho Supreme Court clearly expressed Idaho's state interests when it stated:

> We are cited to no authority which indicates that the duty of fair representation encompasses or displaces those duties created by state law which requires a person, corporation or unincorporated association to refrain from engaging in wrongful *conduct* which resulted in death or injury to person or property." (Pet.App. 114a).

The Court continued:

> . . . the interests protected by state wrongful death statutes are unrelated to those governed by federal labor laws . . . we are cited to no authority which would permit the NLRA to take cognizance of wrongful death claims against unions. We are cited to no authority holding that it may be fairly inferred that Congress meant to deprive the states of their powers of determining litigation brought under state wrongful death statutes. (Pet.App. 115a).

The Idaho Supreme Courts conclusion is in keeping with this Court's recognition of the importance of traditional state laws. *Metropolitan Life Insurance v. Massachusetts*, 471 U.S. at 756.

The Petitioner obliquely threatens through what it calls "policy considerations" that imposition of state law duties will cause the withdrawal of safety related representation. (Petitioner's Brief pp. 22-25). The Union's policy argument focuses on its desire not to be held accountable for the services it provides to its members. These arguments are made without consideration of the public policy considerations of the State of Idaho in allocating its resources, preserving the rights of its citizens, providing for the economic impact created by the death of its workers and for promoting safety in the workplace.

The modern workplace is a confluence of several forces and resources wielded by employers, unions and governments. It is the state's right and burden to manage those resources which are related to safety and health to maximize the economic potential for its citizens and minimize demands on the state treasury for unemployment, handicap and injury loss payments.

This issue of accountability under Idaho law can be illustrated by a helpful hypothetical. Suppose an imaginary company, ABC Inspection Services, Inc., approached the Silver Mine and its workers located in North Idaho and offers its services as an inspector of underground mining activities. ABC, Inc., negotiates and enters into a contract for these services. ABC, Inc., actually undertakes to conduct inspection activities in conjunction with mine company representatives or governmental inspectors. This hypothetical company makes reports of its findings to the company with recommendations which are relied upon and acted upon by the company.

Under Idaho law, ABC, Inc., would be liable to the heirs of miners who are killed as a result of negligence in the discharge of its activities in the mine. Such liability is imposed without reference to or interpretation of the contract entered into by ABC, Inc. This situation is analogous to the Union's conduct and the legal issues in the instant matter. The duties apply to all who engage in activities in Idaho which involve protection of persons. The "standard of conduct" is a tool by which the state creates the incentive for compliance with safety related activities. Idaho, which has a limited body of statutory law, relies heavily on its common law doctrines to define minimum standards for health and safety compliance.

Congress has never excluded unionized workers and employers from laws establishing federal mimimum standards and there is no reason to believe that Congress intended state mimimum standards to be applied only to non-unionized work areas. *Metropolitan Life Insurance v. Massachusetts*, 471 U.S. at 755.

The Union proposes that it should not be held accountable under state law for its wrongful conduct in performing inspection duties. It claims that it would be

hampered in its representational abilities and would be unable to provide such services to its members. The Union has suggested that if it is held accountable it might refuse to negotiate for the right to participate in safety inspections. (Petitioner's Brief for Cert. p. 18).

Allowing the State to maintain this state law requirement for accountability will not introduce any objectionable impediment to the Union's equality of bargaining power. *Metropolitan Life Insurance v. Massachusetts*, 471 U.S. at 754-755.

In short, the Union seeks the protection of immunity so it need not compete in the market place of labor representation with other Unions who can and will engage in reasonable safety inspections. Such a contention is contrary to this nation's competitive ideals and historical successes. *Metropolitan Life Insurance v. Massachusetts*, 471 U.S. at 755.

Competition is the lifeblood of our economic system. Competition requires accountability to be effective. Accountability drives the wheels of faithful performance. Holding a Union accountable for conducting reasonable safety inspections operates to improve the services provided to Union members and thereby benefits the state interests.

If, as the Union has suggested, it would not bargain for the right to participate in improvement of employee safety, at least the employer, state and the employee/Union member would be aware of that fact rather than relying on safety inspections for which there is no enforceability or accountability incentive. More importantly, the Union would be faced with the possibility that competition would offer better services in the area of safety. Accountability will serve to improve the overall

product offered by all Unions. Thus, the Petitioner's view of non-accountability is lodged in an illogical and non-productive argument.

The reality is that Union accountability for its wrongful conduct through state law encourages the improvement of the services a Union provides to its members and permits the state to manage its workplace related resources. This occurs, in part, as a result of the interplay of competitive forces and in part due to enforcement of the state's interest in workplace safety by assigning the risk of negligent conduct to the wrongdoer (rather than on already strained state resources).

Accountability of the Union for reasonable inspection activities, where that activity is assumed, will allow the state to allocate its own limited resources for safety inspections to areas where such support is less available. The state's burden to provide for the workplace safety for its citizens and to provide the financial support for work related injuries is a substantial and compelling state interest. States must be permitted to marshall the resources available to them and to exercise control through state laws which seek to compel reasonable performance levels.

Before this Court preempts Idaho from allowing its citizens recourse through the state law and its wrongful death statute, it must first conclude that Congress intended such a result. *Metropolitan Life Insurance v. Massachusetts*, 471 U.S. at 738, 740-741, 751-757.

III. RESPONDENTS' CLAIMS ARE NOT PREEMPTED BY THE JUDICIALLY CREATED DUTY OF FAIR REPRESENTATION.

The primary emphasis of Petitioner's brief urges that Respondents' claims are preempted by the Union's "sole"

duty, i.e., a duty of fair representation. The Union in reality is urging an unprecedented form of immunity. The Union is attempting to create, for Unions, more protection than is enjoyed by almost any other entity or individual including most governments.

There is no explicit preemption of the state's right to enforce traditional state laws. Absent explicit preemption, courts sustain local regulation unless it conflicts with federal law or frustrates the federal scheme. *Metropolitan Life Insurance v. Massachusetts*, 471 U.S. at 757.

The duty of fair representation was judicially developed in accord with a statutory scheme designed by Congress to promote sound industrial labor relations. Section 9a of the National Labor Relations Act (NLRA) grants a Union (receiving a majority vote of the employees within the bargaining unit) the right to be the exclusive bargaining agent for all employees within that unit. The bargaining monopoly thus created vested the Union with exclusive representation of, and broad jurisdiction over, individual employees.

In order to counter the potential abuse of power that the exclusive bargaining authority granted, the Courts have enforced a concurrent obligation called the duty of fair representation to represent all employees fairly. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Vaca v. Sipes*, 386 U.S. 171 (1967). The duty of fair representation was designed to afford a remedy to employee/union members who were faced with racial discrimination and other such abuses. Thus, the duty of fair representation is a judicially conceived obligation placed upon statutorily created exclusive bargaining representatives to protect

the rights of union members from excesses of majority rule.

Beginning with the watershed case of *Steele v. Louisville & N.R.R., supra,* through *Vaca v. Sipes, supra,* and proceeding to *Breininger v. Sheetmetal Workers Int'l Assn.,* 110 S.Ct. 424 (1989), it has been consistently recognized that the duty of fair representation applies in those instances where there is potential for discriminatory practices on the part of the Union. Never, has this Court stretched the bounds of the fair representation doctrine to the limits suggested by the Petitioner in this matter.

In *Breininger,* this Court faced the question involving discriminatory practices in the administration and management of a hiring hall. Nothing in the *Breininger* decision supports the Petitioner's contention that the duty of fair representation is its "sole" duty. Nothing in *Breininger* supports extending the preemptive effect of the duty of fair representation to *all phases* of a Union's conduct. On the contrary, *Breininger* states quite clearly the limitations of the duty of fair representation doctrine:

> We have long recognized that a labor organization has a statutory duty of fair representation under the National Labor Relations Act (NLRA), 49 Stat. 449, as amended, 29 U.S.C 151, et seq., "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." (Citations omitted) 110 S.Ct. at 429.

The duty of fair representation doctrine has focused on Union activity which is arbitrary, discriminatory or conducted in bad faith.

It has been stated at the Circuit Court level that "mere negligence" does not give rise to a claim for breach of the duty of fair representation. *De Arroyo v. Sindicato De Trabajadores AFL-CIO,* 425 F.2d 281, 284 (1st Cir. 1970). The negligence referred to is negligence in the performance of a Union's contract negotiation, arbitration grievance handling, or hiring practices. This concept has never been heretofore extended to Union conduct for tortious acts.

Virtually everything a Union does is arguably done within its representational capacity. To adopt the Union's position would effectively extend immunity to the Union for any and all wrongful conduct unless it can be shown that under the duty of fair representation the Union acted in an arbitrary and discriminatory fashion. Such a conclusion was never within the intention of Congress nor in the contemplation of the Courts which have applied this doctrine.

It is inconceivable that what began as a concommitment duty imposed upon the Union due to its representational monopoly would now be fashioned into a protective shield to disallow legitimate claims based upon the negligent conduct of a Union as an organization.

IV. RESPONDENTS HAVE NO STANDING TO PURSUE ACTIONS FOR COMPENSATION AGAINST THE PETITIONER UNION BASED UPON THE PROVISIONS OF § 301 OR FOR A BREACH OF THE UNION'S DUTY OF FAIR REPRESENTATION.

Considering the length of time this case has been pending and considering the number of times the issue of

preemption has been raised, it is clear that, in spite of the Idaho Supreme Court's inquiry, the question of the Respondent heirs' lack of standing before the NLRB is not disputed by the Petitioner. (Pet.App. 115a). The Respondent heirs have no forum for remedy except through the state action. *Metropolitan Life Insurance v. Massachusetts*, 471 U.S. at 757. Claims of the deceased miners' widows and children as plead under Idaho law are the individual claims of the widows and children resulting from the wrongful deaths of their husbands and fathers. These claims do not include claims the miners may have had, if they had survived. Nor are they based upon any rights or privileges granted to the employee miners under the Collective Bargaining Agreement. *See* e.g. *McLaughlin v. E-Systems, Inc.*, 403 F.Supp. 67 (1975 N.D. Tex.) (Retired employees have no standing to bring suit under the Collective Bargaining Agreement since they were not members of the bargaining unit and Union had not bargained for them.)

An analysis of this issue was provided in *Adkins v. G.M. Corp.*, 556 F.Supp. 452 (1983 S.D. Ohio).[3] The *Adkins*

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[3] This decision was the first in a series of opinions out of the Ohio District Court and 6th Circuit based upon the same original Complaint. The Court in *Adkins I* noted:

> No formal relationship between the spouses and any one of the Defendants is alleged. Without citing authority GMC argues that "[t]here are absolutely no factual allegations that support the conclusion that spouses have rights under [§ 301]. Surely marital

(Continued on following page)

Court (Adkins I), while not precedent for this court, analytically addressed the issue of whether spouses of employees and former employees had standing to sue on the basis of their marital status for damages under the LMRA. The *Adkins* spouse-plaintiffs alleged injury due to the "loss of services, society, and companionship" of their injured mates as a direct result of the mental distress suffered by the employee-spouse.

The *Adkins* Court held that the spousal Plaintiffs had no standing to sue for damages under § 301. They were not parties to the Collective Bargaining Agreement and were not third party beneficiaries since they did not have a personal or beneficial interest in the enforcement of such an agreement. 556 F.Supp. at 456.

The reasoning of *Adkins I* with regard to spousal claims is consistent with the Respondents' wrongful death claims here. Such wrongful death claims are clearly individual and not derived from an interest under the Collective Bargaining Agreement. The *Adkins* Court

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(Continued from previous page)

> status does not create a cause of action based on breach of the Collective Bargaining Agreement.
>
> To resolve this question, the Court must decide which parties can bring suit under § 301. The statute is not particularly helpful, since it speaks in the passive voice ("suits . . . may be brought"), and does not identify who can bring suit. However, "courts have generally held [§ 301] creates federal jurisdiction only over parties to the contract being sued upon. (Citation omitted). 556 F.Supp. at 455.

found no preemption of the the spousal-plaintiffs' loss of consortium claims.[4]

A cause of action pursuant to Idaho's wrongful death statute is an individual right of the heirs of the decedent miners. It is independent of any rights granted the miners under the Collective Bargaining Agreement.

The damages recoverable by heirs under Idaho Code § 5-311 are limited. The Idaho Courts have determined that I.C. § 5-311 does not create a right for a survival action, but only a cause of action for the benefit of the heirs. *Russell v. Cox*, 65 Idaho 534, 148 P.2d 221 (1944).

The Idaho Court in *Vulk v. Haley*, 112 Idaho 855, 736 P.2d 1309 (1987) stated:

> Since pain and suffering are personal to the deceased and are not damages suffered by the survivors, an action for pain and suffering under I.C. § 5-311 does not survive death. *Id.* at 858, 736 P.2d at 1312.

The heirs in a wrongful death action are limited to recovery for loss of support and services as well as the loss of love, society, companionship and affection. *Sawyer v. Claar*, 115 Idaho 322, 766 P.2d 792 (App. 1988).

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[4] The *Adkins* Court held:

> The Court construes these allegations to be a typical loss of consortium claim under Ohio law. (Citation omitted) Initially, the Court again finds no preemption difficulty, since the tort of causing a loss of consortium is not arguably protected or prohibited by the NLRA. Under Ohio law, the Court finds that the spousal-plaintiffs have stated a viable, if unusual, cause of action. 556 F.Supp. at 458.

Not only are such claims not preempted by federal labor law, there is no other forum where the Plaintiffs in this matter would have standing to bring an action under § 301 or an action based upon the Union's duty of fair representation. To preempt the claims of the heirs under Idaho law would effectively grant immunity to the Union for wrongful death claims which arise in such cases in Idaho.

CONCLUSION

Based upon the foregoing reasons and authority, the Respondents respectfully urge that the decision of the Idaho Supreme Court be affirmed.

Respectfully submitted,

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No. 89-322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioner,

v.

THARON RAWSON, Individually and as Guardian Ad Litem for SETH RAWSON and CINDY RAWSON; BERNIECE JOHNSON, Individually and as Guardian Ad Litem for MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON, and JOHN RUSSEL JOHNSON; LAURA DUNBAR, as Guardian Ad Litem for RICKINA ROSSITER and GLEN ROSSITER, JR.; and MARY WOOD, as Guardian Ad Litem for LESLIE D. WOOD, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Idaho

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Respondents.

On Writ of Certiorari to the Supreme Court of Idaho

REPLY BRIEF FOR PETITIONER

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1. Portions of plaintiffs' brief can be read to suggest that regardless of the limited contractual authority stated in Article IX of the collective bargaining agreement the union *in fact* went further and performed inspections of the Sunshine Mine.[1] Based on that premise, plaintiffs

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[1] Although plaintiffs' brief from time to time lapses into phrases like "the Union undertook to perform inspections" (Resp. Br. at 5; *see also id.* at 1, 2, 19), the only passage in which that brief has any *description* of what the union in fact did is the following (Resp. Br. at 4-5, emphasis added):

[Footnote continued]

argue that the following state law tort rule can be applied to the union here: a person who makes inspections and who fails to conduct those inspections "in accordance with recognized standards" (Pet. App. 29a) may be liable in a state law tort action for hazards that a competent inspector would have discovered. Resp. Br. 12-19, 22. The short answer in this case is that the undisputed facts make it clear that the union never in fact performed inspections of the mine.

In our opening brief, we described in some detail Article IX of the collective bargaining agreement, which defined the union's role with respect to inspections of the Sunshine Mine. Pet. Br. at 4-5. That article did not provide the union any authority to conduct inspections of the mine. Rather, the article permitted the union to designate a rank-and-file union member to "accompany" the state mine inspector on state inspections of the mine and to designate a member to "accompany" the company

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[1] [Continued]

The Union has not denied nor does it deny in the present brief of Petitioner that it was not *involved* in safety inspections. The Union in fact concedes:

> A union member of the committee was permitted to accompany the state mine inspector on any state inspection made of the property. The union was also permitted to designate a representative to accompany the company's safety engineer once each month on a tour of the section of the mine . . . . The Union appointed three rank and file members . . . to serve on the joint safety committee . . . (Pet. Br. p. 5).
>
> . . . A union representative regularly accompanied the state mine inspector when he came to the mine to make the inspections that were mandated by Idaho law. One of the union representatives also accompanied the company safety engineer each month on a tour of a section of the mine that the safety engineer designated. The safety committee met regularly . . . to discuss what had occurred on these tours and to offer suggestions about safety concerns. (Pet. Br. p. 5).

safety engineer once each month on "a tour of a section of the mine" (J.A. 22). And the union had no right to conduct inspections of the mine without the company's agreement.[2]

Not surprisingly, the undisputed record evidence shows that the union's role in practice was precisely that provided for in Article IX. The union did appoint a rank-and-file member to accompany state or company mine inspectors: the state or company inspectors actually conducted the inspections; the union representative did not. The primary function in fact performed by the union representative in connection with these inspections was to serve as a conduit for safety-related complaints by employees in the portions of the mine being inspected (J.A. 36-37, 103-04). There is no record evidence that the union had any other office—or played any other role—with respect to these inspections; in particular, there is no evidence that the union itself ever performed an inspection of the mine.[3]

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[2] For example, Article IX did not provide for a union representative to accompany the federal inspector on the periodic federal inspections of the mine, and the company did not permit any union member to do so (J.A. 96).

[3] In this regard, we emphasize that neither in their brief to this Court nor previously have plaintiffs relied on, or attempted to support, the Idaho Supreme Court's assertion, in the opinion rendered after this Court's decision in *Electrical Workers v. Hechler*, 481 U.S. 851 (1987), that the union had "conceded" that the union "undertook to inspect" or "did actively undertake the subject inspection duties." (Pet. App. 5a-6a; *see* Pet. Br. at 11). As one of the dissenting justices pointed out, the union made no such concession (Pet. App. 10a; Pet. Br. at 11-12).

And, in their brief to this Court, plaintiffs cite no record evidence that the union ever performed an inspection of the mine. The few citations to the record in plaintiffs' brief are entirely consistent with the union's role as described in what plaintiffs deem to be "conced[ed]" by the union, *supra*, note 1. At various points in their brief, plaintiffs cite two passages of deposition tsetimony in this regard.

One passage is the testimony of Merlin Hoffman, a former safety engineer for Sunshine Mine (*id.* 212-216). Hoffman testified that at

2. Plaintiffs' brief states that "[t]he 'source' of the Union's duty is the *conduct* of the undertaking involving safety inspections." Resp. Br. at 11 (emphasis in original). As we have just shown, the union "conduct" involved here is nothing other than the union's administration of the safety article of the collective bargaining agreement, and the union's efforts to monitor, and attempt to influence, the *employer's* activities regarding safety. And, as we showed in part I of our opening brief, this union conduct is at the core of its function as exclusive bargaining representative and is governed exclusively by federal law.

Without denying the premises of our analysis in this regard, plaintiffs argue that to find federal preemption

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the Joint Safety Committee meetings the union representatives "usually . . . would have a list of items that they would like to have looked at or corrected or taken care of . . ." and that the items that the union observed and called to his attention commonly consisted of "primers, powder, ladders, possibly a defective piece of equipment, something of this sort" (*id.* 213). When asked how frequently he had made inspections, Hoffman responded: "I was down ever[y] day. But with . . . the union once a month" (*id.* 215). He also testified that the union representatives "at times [would] ask me on my daily rounds to stop and look at a specific item . . . to see what they thought were recommendations on whether it was a maintenance problem or a safety problem" (*id.* 216).

The other passage of testimony that plaintiffs cite is the deposition of Lavern Melton, the president of the local union (*id.* 95-99). Melton described the union's participation in inspection activities as "go[ing] on walk-around inspections with the state people" (*id.* 97). He described the union safety representatives' role as to be available to employees who "had any concern for safety," to listen to those concerns and convey them, if appropriate, to the federal or state mine inspectors (*id.* 95, 98). Later in the same deposition Melton testified that "[t]he function of the Safety Committee was to convey employees' concerns to the company" (*id.* 104).

Accordingly, neither passage cited by the plaintiffs supports the proposition that the union itself was performing inspections of the mine, as opposed to accompanying state and company inspectors and passing on to the inspectors, and to management, the safety-related complaints of employees.

in this case would have the effect of granting unions an unlimited immunity from state regulation, and that such an immunity would be too great an intrusion upon the interests of the states to be allowed (Resp. Br. at 27):

> Virtually everything a Union does is arguably done within its representational capacity. To adopt the Union's position would effectively extend immunity to the Union for any and all wrongful conduct unless it can be shown that under the duty of fair representation the Union acted in an arbitrary and discriminatory fashion.

The Idaho Supreme Court similarly suggested that the union's argument would require the preemption of state law "if a member of a union was struck by a motor vehicle owned by the union and operated by one of its officials during the course of his employment for the union" (Pet. App. 114a). As we now show, both the plaintiffs and the Idaho Supreme Court misunderstood the labor preemption doctrine and its limits.

In *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 297 (1971), this Court emphasized that the labor preemption doctrine is "purposefully administered" so that it does not displace "particular rule[s] of law" that are "so structured and administered that in virtually all instances it is safe to assume" that those rules "will not disserve the interests promoted by the federal labor statutes." The limits of the federal preemption rule, in other words, are inherent in the rationale for that rule. We set forth that rationale in our opening brief and do not repeat it here. *See* Pet. Br. 17-25.

Suffice it to say at this point that the process of collective bargaining established by the National Labor Relations Act requires that a union, as exclusive bargaining representative, be accorded a "wide range of reasonableness," *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), in setting and pursuing priorities regarding how to confine through collective bargaining the other-

wise unfettered prerogatives of management, and regarding what contractual rules will be sought to govern the employer's conduct. *See* Pet. Br. 21-22. In particular, federal law requires that a union must be acccorded wide latitude in determining how most effectively to influence the employer's conduct in the respects desired by members of the bargaining unit. State law may not impose duties that are different from or in addition to the duties imposed by federal law in this regard, because such state law duties would narrow this "wide range of reasonableness." *Id.* at 22-23; *cf. Teamsters Union v. Oliver*, 358 U.S. 283, 296 (1959).

If state tort law imposed liability on a union for failing to negotiate for certain contract provisions, for failing to devote more resources to the prosecution of a particular grievance or arbitration, for failing to use particular methods or strategies to enforce an employer's obligations, for failing to achieve a particular result, or for not doing what someone might consider a good enough job at any of these representational tasks, that form of state regulation would strike at the vitals of the federal scheme. This Court has recognized as much and has determined that such representational activity is governed exclusively by federal law in order to assure that the careful balances struck by the federal labor policy are respected. *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 194-195 (1967) (processing grievances); *Teamsters Union v. Morton*, 377 U.S. 252, 258-260 (1964) (choosing a lawful method to exert pressure on employer); *cf. Humphrey v. Moore*, 375 U.S. 335, 349-350 (1964) (administering contractual seniority provisions); *Ford Motor Co. v. Huffman*, 345 U.S. at 338 (negotiating for particular contract provisions). By the same token, it would impermissibly narrow the range of discretion accorded unions by federal law, if state tort law were permitted to regulate the union's choice as to how to implement Article IX of the collective bargaining agreement in this case.

While federal policies thus govern a union's exercise of its role as exclusive representative *in dealing with the employer* on behalf of the members of the bargaining unit, federal law has no similar special application to a myriad of other union activities. For example, the federal labor policy provides no particularized insight into the rules on licensing or maintenance of a union's car, or into the building codes that apply to a union's offices. Thus, there is no reason why the states would be prevented from applying to unions the same rules of conduct that apply to everyone else in the operation of motor vehicles or in the maintenance of property. With respect to such state law rules of conduct in the normal run of cases there is no substantial risk of conflict with federal policies. The "wide range of reasonableness" accorded unions by federal law was not meant to apply to conduct like the operation of motor vehicles.

Simply put, federal law has established the limits of regulation of the unique function performed by unions in our system of labor relations: the role of exclusive representative of employees *in dealing with their employer* with the end in view of *regulating the employer's conduct*. As to that function, inconsistent or additional state regulation must be preempted if the policies of federal law are to be effectuated. Congress has defined "[a] union's rights and duties as the exclusive bargaining agent in carrying out its representational functions . . .; Congress has 'occupied the field and closed it to state regulation.'" *Condon v. Steelworkers Local 2944*, 683 F.2d 590, 595 (1st Cir. 1982), *quoting from Teamsters Union v. Morton*, 377 U.S. at 261. The argument we make goes no further. Certainly that argument does not imply that unions have some general immunity from state regulation in areas where federal law has not occupied the field.[4]

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[4] Believing that heirs of employees cannot recover under federal law on either a breach of contract or duty of fair representation

3. Plaintiffs readily concede that the application of state tort law in a case such as this would regulate and affect the manner in which unions carry out their representational functions. Indeed, plaintiffs argue that states have a legitimate interest—in fact a "compelling . . . interest[]" (Resp. Br. 9)—in regulating and affecting such union conduct. Thus, for example, plaintiffs assert that Idaho has an interest in: fostering competition among unions as to which union would offer employees of the mine the best representation with respect to safety (Resp. Br. 23-24); "encourag[ing] the improvement of the services a Union provides to its members and permit[ting] the state to manage its workplace related resources" (*id.* 24); and permitting states "to marshall the resources available to them and to exercise control through state laws which seek to compel reasonable performance levels [from unions]" (*id.*).

These "state interests" all rest on the premise that the state has a legitimate concern with the manner in which unions perform their federally created representational functions. But, as we have already shown, federal law leaves no room for states to pursue such interests. It is not open for the states to assert an interest in how unions compete with each other or perform their represen-

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theory, plaintiffs attempt to make a virtue of necessity by arguing that their lack of "standing" under federal law requires that they be accorded a remedy under state law. Resp. Br. at 27-31. We are hard pressed to understand plaintiffs' belief that they lack standing to pursue a federal fair representation claim. *See Vaca v. Sipes*, 386 U.S. at 174. But in any event, in thus reframing the argument in terms of the identity of the *claimants*, plaintiffs once again disregard the basis for federal preemption in this case. The performance of a union's representational functions, and the "wide range of reasonableness" that federal law accords to unions would be no less affected, and the federal policy would be no less frustrated, if the representative were subject to damages payable to the employees' heirs than if suit were brought by the employee himself.

tational functions.[6] And plaintiffs' acknowledgment that application of the Idaho tort law in this case would affect union representation in the ways just described further illustrates why that rule must be preempted by federal law.

4. Plaintiffs argue that to allow Idaho tort law to govern the union's safety activities would be equivalent to the application of state "minimum employment standards," which generally are not preempted by the National Labor Relations Act under *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 751-758 (1985). *See* Resp. Br. at 22-23. The complete answer to this argument is that a rule that directly regulates the conduct of a union in fulfilling its responsibility as exclusive bargaining representative is not a "minimum employment standard" of the type that this Court found not preempted in *Metropolitan Life*. In that case the Court defined state minimum employment standards as follows:

> Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes

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[5] Even if these state interests were legitimate and indeed "compelling state interests," federal preemption would be appropriate here. This Court has repeatedly held that a "compelling state interest" is immaterial to preemption analysis when the conflict between federal and state law is substantive.

> Where, as here, the issue is one of an asserted substantive conflict with a federal enactment, then "[t]he relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that the federal law must prevail." [*Brown v. Hotel Employees*, 468 U.S. 491, 503 (1984), *quoting from Free v. Bland*, 369 U.S. 663, 666 (1962).]

See also, e.g., Felder v. Casey, 487 U.S. 131, 137-138 (1988); *Fidelity Federal Savings & Loan v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 526 n.22 (1981); *cf. City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638-639 (1973).

> that are the subject of the NLRA. Nor do they have any but the most indirect effect on the right of self-organization established in the Act. Unlike the NLRA, mandated-benefit laws are not laws designed to encourage or discourage employees in the promotion of their interests collectively. . . . Nor do these laws even inadvertently affect these interests implicated in the NLRA. Rather, they are minimum standards "independent of the collective-bargaining process [that] devolve on [employees] as individual workers, not as members of a collective organization." [471 U.S. at 755, *quoting from Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 745 (1981).]

The Court concluded that state minimum employment standards do not conflict with the NLRA because the NLRA is "concerned primarily with establishing an equitable *process* for determining terms and conditions of employment," 471 U.S. at 753 (emphasis added), while minimum employment standards only set *substantive terms* for wages, benefits, or working conditions that an employer must provide, and are "unrelated in any way to the *processes* of bargaining or self-organization," *id.* at 756 (emphasis added).

Application of Idaho tort law in this case would be wholly incompatible with the rationale of the *Metropolitan Life* decision. Idaho tort law does not set any substantive terms that employers must provide; instead, Idaho law would apply directly and exclusively to the "processes of bargaining [and] self-organization," by imposing special duties on the union to police the employer's maintenance of a safe workplace. The tort rule in question would not apply in unorganized workplaces at all, because in such a workplace there is no union to police any employer activities. In short, for the very reasons that application of the Idaho tort law to the union conduct here would interfere with the union's exercise of its representational functions, *see supra* at 4-7, the minimum standards concept of *Metropolitan Life* does not apply here.

5. In the final analysis, plaintiffs do not directly dispute any of the *premises* of our argument for preemption. Plaintiffs do not dispute that the duty of fair representation applies to the union's efforts to monitor the company's compliance with its safety obligations (*see* Pet. Br. at 18-19); that the duty has evolved as a careful balance between individual and collective interests within the bargaining unit (*see id.* at 21-22); that the addition of state law duties would upset that careful balance (*see id.* at 22-25); or that preemption is required whenever the application of state law would upset such a federal balance (*id.* at 25).[6]

Plaintiffs' real objection seems to be to the consequences of preemption, as to which plaintiffs have a very straightforward concern. If plaintiffs' state tort claim against

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[6] While plaintiffs cite and quote from several of this Court's preemption cases, none is inconsistent with the rule that preemption is required whenever the application of state law would upset a federal balance between competing interests. All of the cases plaintiffs cite, moreover, expressly rest upon the basic premises on which that rule rests, namely, that preemption is required if the state rule "conflicts with federal law or would frustrate the federal scheme." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985). *See also id.* at 751; *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *cf. Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981).

Plaintiffs quote a passage from the *Silkwood* opinion that "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." Resp. Br. at 20, *quoting from* 464 U.S. at 251. In *Silkwood* the conduct at issue was "illegal" because it violated federal regulations governing the handling of radioactive materials, *id.* at 248. In the instant case the quoted sentence from *Silkwood* begs the question: the union's conduct in regard to safety inspections could only be denominated "illegal" if state negligence law is applied; if the federal duty of fair representation supplies the exclusive standard by which the union's conduct may be judged, what the union did falls within the "wide range of reasonableness" that federal law affords unions. *See* Pet. Br. at 23-27.

the union is preempted, plaintiffs will be left with their recoveries from the employer under the Idaho workers' compensation scheme, and their recoveries from certain third-party manufacturers in a separate tort action. *See House v. Mine Safety Appliances Co.*, 573 F.2d 609 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978). And plaintiffs regard these recoveries as inadequate. That, we submit, is not a basis for failing to follow the logic of the preemption doctrine. It is the State of Idaho that has determined that the only recourse against the employer—the entity responsible for the safety of the mine—is under the state workers' compensation scheme, and it is the state that has set the levels of compensation under that scheme. If the recoveries under the Idaho workers' compensation scheme are inadequate, the answer is to amend that Idaho law, not to override the governing principles of federal labor law.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the decision and judgment of the Supreme Court of Idaho should be reversed.

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No. 89-322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

THARON RAWSON, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* FOR SETH RAWSON AND CINDY RAWSON; BERNIECE JOHNSON, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* FOR MICHAEL WAYNE JOHNSON; LAURA DUNBAR, AS GUARDIAN *AD LITEM* FOR RICKINA ROSSITER AND GLEN ROSSITER, JR., AND MARY WOOD, AS GUARDIAN *AD LITEM* FOR LESLIE D. WOOD,
Respondents.

On Writ of Certiorari to the Supreme Court of Idaho

BRIEF OF PUBLIC CITIZEN AS *AMICUS CURIAE* URGING REVERSAL, BUT IN SUPPORT OF NEITHER PARTY

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Respondents.

BRIEF OF PUBLIC CITIZEN AS *AMICUS CURIAE*

INTEREST OF AMICUS CURIAE

Public Citizen is a public interest organization which was founded in 1971 by Ralph Nader. Attorneys for Public Citizen have litigated numerous cases concerning the various legal principles that converge in answering the

questions presented here. Thus, Public Citizen's attorneys have represented numerous union members in litigation arising from inadequate representation by their unions, *e.g.*, *West v. Conrail*, 481 U.S. 35 (1987), and in cases raising the question of whether minimum labor standards are preempted by federal labor law, most important by sections 203(d) and 301 of the Labor-Management Relations Act ("LMRA"). *E.g.*, *Lingle v. Norge*, 108 S. Ct. 1877 (1988); *Barrentine v. Arkansas Best Freight System*, 450 U.S. 728 (1981). Public Citizen has also been deeply involved in the enforcement of the Occupational Safety and Health Act and the Mine Safety and Health Act, including activities ranging from rule-making petitions before the Department of Labor to challenging the Department's subversion of that Act in the courts. *E.g.*, *Public Citizen Health Research Group v. Brock*, 823 F.2d 626 (D.C. Cir. 1987); *OCAW v. Zeeger*, 768 F.2d 1480 (D.C. Cir. 1988). *See also* Goldberg, *Winning at the Occupational Safety and Health Review Commission* (Health Research Group 1981).

Public Citizen has found that employee involvement in workplace safety inspections is crucial for strong occupational safety enforcement. We also share the fear expressed by the petitioner that if state courts unthinkingly impose liability on unions for their participation in such inspections, even if done for the best of reasons, that may cause unions to react by limiting the extent to which they permit their members to participate on their behalf. On the other hand, we are concerned that the expansive arguments for federal preemption upon which petitioner relies may invalidate state law claims that ought to be permitted. Public Citizen files this brief, with the written consent of the parties, in order to explain our view on how this case should be decided without having to resolve

these competing considerations on an all-or-nothing basis, and in a way that would determine only the case now before this Court.

STATEMENT

This case arose from a 1972 mining accident in the Sunshine Mine in Kellogg, Idaho, in which ninety-one miners died, including respondents' decedents. The workers' families collected limited benefits under the state workers compensation system which, under Idaho law, provides the exclusive means of redress against employers for workplace injuries. Because Idaho's workers compensation system is so inadequate (the survivors' benefits have consistently ranked among the lowest in the nation, U.S. Chamber of Commerce, *1979 Analysis of Workers Compensation Laws* Chart VII, U.S. Chamber of Commerce, *1989 Analysis of Workers Compensation Laws* Chart VIII), the families then began a search for other sources to compensate them for their losses. This action against the United Steelworkers of America ("USWA"), the international union that entered into a collective bargaining agreement ("CBA") covering the Sunshine Mine, is the only such claim that has survived summary dismissal. In it, respondents alleged that, pursuant to the CBA and the USWA Constitution, members of Steelworkers Local 5089 had participated in various inspections of the Mine but had negligently failed to notice or call to management's attention various safety problems which, had they been corrected, could have prevented decedents' injuries.

Respondents claimed that this negligence was actionable under state law fraud and tort theories. The

fraud claim, which was based on supposed representations by the union that it had special expertise in safety and that it would use that expertise to protect members from accidents, was dismissed for lack of evidence. Pet. App. 16a-18a. However, the Idaho Supreme Court upheld the negligence claim under state law, relying on the Restatement of Torts which imposes liability for negligence on one who "undertakes" to render services to another. Pet. App. 19a. The court found "the basis for a negligent undertaking" in two places: Article 9 of the CBA, which provided for a plant safety committee and permitted workplace inspections by that committee, and the International's Constitution, which required the establishment of safety and health committees in each local union. Pet. App. 24a. The Court concluded, "Because the union, pursuant to the provisions of the [CBA], had contracted to inspect and *in fact inspected* the mine, it owed the (minimal) duty to its members to exercise due care . . .." Pet. App. 29a (emphasis in original).

The Idaho court also held that the state law negligence claim was not preempted by section 301 of the LMRA, purporting to distinguish this Court's holding in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). Under *Allis-Chalmers*, any state law claim that is substantially dependent on an interpretation of a CBA is preempted by section 301 because it is in reality a section 301 claim that is governed by principles of federal labor law. The Idaho court readily conceded that the provisions of the CBA would "determine . . . the nature and scope of the Union's duty," but reasoned that the more important question in the case was whether the duty imposed by the CBA had been violated. Pet. App. 33a-34a. In the view of the court below, such limited reliance on the CBA was not sufficient

to displace the substantial interest of the state in preventing common law negligence. Pet. App. 34a-35a, *citing Hechler v. IBEW*, 772 F.2d 788 (11th Cir. 1985), *rev'd*, 481 U.S. 851 (1987).

After this Court reversed the *Hechler* decision on which the Idaho court relied, it vacated the decision in this case and remanded for reconsideration in light of *Hechler*. On remand, the union asked the court to reconsider its state law holdings as well as its preemption analysis, but the court pointedly refused to do so, holding that its analysis of state law was the "law of the case" and would not be reopened. Pet. App. 9a. On the preemption issue, the court distinguished this case from *Hechler* on the ground that, unlike that case, here "the tort exists without reference to the [CBA]." Pet. App. 7a. The court did not say how such reference could be avoided in establishing the "nature and scope" of the union's undertaking, because it asserted, albeit without citation to the record, that "the parties concede that the union did actively *undertake* the subject inspection *duties*." Pet. App. 6a. (emphasis added).

SUMMARY OF ARGUMENT

In many ways, this is a case in which the facts cry out for relief. There has been a terrible accident, which took the lives of ninety-one miners. The miners' decedents have received grossly inadequate payments for the loss of their loved ones, and this is the only remaining case that can provide such compensation. In those circumstances, many courts might be influenced to find a way to hold the petitioner liable, and we believe that the lower court was influenced by the absence of any other basis for relief to

find a way for these claims to survive. But it is important to remember that the fundamental wrong here was committed by the employer, which maintained an unsafe workplace, and that the reason why respondents received inadequate compensation from their employer is that Idaho has made the basic policy choice to eliminate an employer's liability for negligence and to substitute a rule of absolute liability, coupled with very low monetary remedies.

On the other hand, the petitioner also has a very appealing case. It can point to the fact that, at most, it only failed to tell the employer that the Sunshine mine was unsafe, and it can make the point, with which Public Citizen is in fundamental agreement, that the consequence of imposing liability on unions for conducting negligent safety inspections may be to discourage them from conducting any inspections at all.

Although, as we have indicated, Public Citizen shares petitioner's concern about the impact of a state rule imposing blanket liability for negligent inspections, we do not agree with petitioner that the sole measure of a union's performance on behalf of its members is whether it has acted arbitrarily or discriminatorily toward them, under the federal principles established by the duty of fair representation ("DFR"). In our view, there are a number of instances in which the states may be permitted to impose some obligations on a union's representation of its members beyond the DFR. The question of whether the federal duty excludes all state duties in any circumstances is sufficiently difficult and complex that we urge the Court not to reach it because, as we argue below, it is unnecessary to do so here.

It is unnecessary to consider the DFR preemption question because it is apparent that respondents' state law

claims are preempted by section 301 of the LMRA. The state court held, as a matter of state law, that a union can be held liable if it makes an "undertaking" to conduct inspections, and it found such an undertaking in two documents: the CBA between petitioner and the Sunshine Mine, and petitioner's constitution. Under this Court's precedents, both documents are "agreements" whose enforcement has been committed solely to the province of federal law, under principles based on federal labor policy that are to be developed under this Court's guidance. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); *Plumbers v Plumbers Local 334*, 452 U.S. 615 (1981). Although the Idaho Supreme Court asserted in conclusory terms that reference to the CBA is not required, that court identified no source other than those two documents for the union's alleged undertaking that underlies the state duty. Hence, the principles of federal law must govern the determination of the scope and nature of that duty.

To say that section 301 controls that question, however, is not automatically to resolve the case in petitioner's favor. Although a violation of the DFR is normally required before a court may reach the question of whether an *employer* violated the CBA, there is no basis for requiring a breach of the DFR before a *union* may be held to have violated one of its own undertakings in a CBA or in its constitution. Nor would there be any basis for concluding that a union's contractual undertakings, and the federal enforcement of those undertakings, is somehow "preempted" by the DFR. It may be unusual for a union to make affirmative promises in a CBA, but that is what respondents alleged here, and they are entitled to have a court pass on those allegations.

Turning to the CBA here, petitioner does not appear to us to have made any affirmative undertaking to protect members against the employer's unsafe practices, and certainly not the kind necessary to assume a major portion of the employer's vast potential liability for unsafe practices. The constitution also seems to contain no more than vague statements of objectives, not commitments to guarantee certain results or even efforts of a certain quality. Accordingly, the judgment below should be reversed, and unless respondents can point to something else in the record indicating that they will be able to make a showing that the constitution contains such a promise, the Idaho courts should be instructed to dismiss the action.

ARGUMENT

I. THE QUESTION OF THE CIRCUMSTANCES IN WHICH THE STATES MAY REGULATE A UNION'S REPRESENTATION OF ITS MEMBERS DURING THE TERM OF A COLLECTIVE BARGAINING AGREEMENT RAISES COMPLEX ISSUES OF FEDERALISM THAT SHOULD BE AVOIDED UNLESS THE QUESTION IS SQUARELY PRESENTED.

Although nowhere expressly set forth in any labor statute, the duty of fair representation is a necessary product of the fact that a free society, which places a high value on the rights of the individual, nevertheless makes collective bargaining the central element of its national labor policy. Federal law gives a majority of employees in an appropriate bargaining unit the right not only to choose a representative for purposes of collective bargaining, but

also to impose their choice on all other employees in the unit, depriving the minority of the right to bargain for themselves. National Labor Relations Act ("NLRA"), Section 9, 29 U.S.C. § 159. *See Emporium-Capwell Co. v. Western Add'n Cmnty. Org.*, 420 U.S. 50 (1975). This exclusive representative (the union) has the right to abrogate any bargains that might be struck by individual employees. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). Moreover, once an agreement has been reached, the union has the exclusive authority to decide in each case whether to use the enforcement mechanisms created by it — normally a grievance and arbitration system — to seek redress for violations of the contractual rights of individual members. *See Vaca v. Sipes*, 386 U.S. 171, 190-191 (1967).

In a free society, such authority carries with it a responsibility to the individuals whose bargaining rights are thus extinguished. Indeed, as the Court recognized in *Steele v. Louisville & Nashville R.R.*; 323 U.S. 192, 198-199 (1944), grave constitutional questions would arise unless the union also had a duty to exercise these statutory powers in a manner fair to all employees. Although *Steele* arose under the Railway Labor Act, the Court found a similar duty to represent employees "fairly and impartially" under the NLRA. *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953). And, because the collective representative also controls the individual's access to the grievance system, the Court has ruled that the DFR extends to a union's exercise of its grievance handling authority, as well as to the power to negotiate contracts, which was involved in earlier cases. *Vaca v. Sipes*, 386

U.S. 171 (1967); *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976).

In recent cases, the AFL-CIO and its constituent international unions have tried to persuade the Court to transform the duty from a limitation on a union's exclusive authority into a shield against state regulation, by ruling that only the federal government may regulate the manner in which unions exercise their discretion in the representation of the employees whom they represent. *E.g., IBEW v. Hechler*, 481 U.S. 851 (1987), Second Question Presented. Their theory is that, by (implicitly) creating the duty of fair representation ("DFR") as a concomitant of the exclusive representation authority granted to unions by the National Labor Relations and Railway Labor Acts, Congress intended to preclude the states from regulating in any way the decisions made by unions in the course of such representational activities.

We agree that there are some, and probably many, representational decisions that may not be regulated by the states. However, there are a number of union decisions that may be within the power of the states to regulate, and Public Citizen is worried that, in addressing the broad question that the petitioner poses here, the Court might unnecessarily resolve a host of other questions that should await another day when their facts and supporting arguments are directly before the Court.

In our view, the Court need not decide the broad question that petitioner seeks to present because a more direct and better established ground for preemption would fully resolve this case. Thus, as we argue in Part II of this brief, the tort duties that have been held by the Idaho Supreme Court to have been imposed on petitioner are all based on promises supposedly made by the union and the

enforcement of those promises is governed by section 301 of the LMRA.

Petitioner seems to suggest that the question of DFR preemption is an all or nothing proposition — that either states can impose no duties on a union with respect to the representation of its members, or the floodgates open and unions can be subject to any manner of conflicting regulations, policies and forums in the various states with respect to all of their activities. We are not so sure that the solution is so clear. Whether state regulation is permitted may depend on the area of the union's activities and the relative strength of the interests of the state. It may also depend on the standards according to which the DFR is applied, which have evolved from the Court's initial decision in this area in *Steele*, which concerned racial discrimination in the negotiation of CBAs, through the recent decision in *Breininger v. Sheet Metal Workers Local 6*, 110 S. Ct. 424 (1989), which concerned arbitrary as well as discriminatory conduct in the administration of a union hiring hall. And it may depend on the extent to which the DFR is flexible enough to incorporate the substantive regulations that the state may impose on the workplace, while nevertheless preserving federal procedures and a federal forum to ensure that the policies underlying federal labor laws are not ignored.[1]

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[1] For example, union discrimination against certain groups of members is plainly something that the DFR forbids, but state law may have a substantial role to play in determining which forms of discrimination are prohibited. After all, there are many kinds of "discrimination" that a union may presumably undertake without running afoul of the DFR. For example, most courts would acknowledge that a union may choose to favor high seniority over low seniority workers. On the other hand, suppose that, as a matter of public policy, some states choose to extend protections to

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This is not a field, after all, in which either the basis for preemption or indeed the basis for the substantive standards of federal law have been set forth in any statute. To the contrary, both the standards of the DFR and the argument for preemption are based on judge-crafted policies that have been inferred from the very sketchiest of statutory language and, indeed, have been created in part simply to avoid serious constitutional questions. In those circumstances, the Court has every reason to avoid ruling for or against preemption as an all-or-nothing matter, and indeed to proceed with great caution and avoid the question altogether if, as we suggest, there is an alternate basis for deciding this case.

Petitioner couches its Question Presented in what might be argued to be narrow language, including only union decisions made in the course of "administering and enforcing" provisions of a CBA, and it may be that in arguing the merits petitioner will concentrate on that proposition, while eschewing the more expansive language in its Petition extending its argument to all decisions that unions make "to deal as they and their members deem best with problems in the workplace." *Id.* at 21. However, we are concerned that the broader view may prevail because most of a union's activities could be construed to fall within the ambit of contract administration and enforcement.

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whistleblowers who report on plant problems that cannot be corrected without making the plant unprofitable, or to workers carrying the HIV virus. Even if, under the DFR as presently construed, a union might be able to rationalize a decision not to protect such workers on the ground that the workers' larger economic interest points in another direction, the fact of state law protection might be recognized by federal law in determining that this is a kind of discrimination that is actionable.

It may also be that, in advocating preemption of state regulation of a union's efforts to "administer or enforce" the provisions of a CBA, petitioner intends to foreclose state regulation only of union enforcement of rights that depend for their existence solely on the CBA itself. But, if that is all that petitioner seeks in its DFR preemption defense, then its argument depends on the underlying premise that the state law rights asserted by the respondents are substantially dependent on the CBA, and that, as we show in the next section of this brief, is also the predicate of section 301 preemption. Therefore, that reading of petitioner's argument would make it wholly unnecessary to reach the DFR preemption issue because the same premise produces the same result under the well-established doctrine of preemption of state law claims under section 301, to which we now turn.[2]

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[2] If petitioner were correct that it is "settled law" that the DFR preempts state law governing the manner in which unions represent their constituents, Petition at 15, *citing Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), then it would not matter that petitioner was only seeking a restatement of that settled conclusion. However, *Lockridge* did not go quite so far as petitioner suggests. In that case the plaintiff's theory was that the union had misread the CBA, and it was in that context that the Court held that the DFR created the standard governing union-employee relations. Moreover, the union there had sought the worker's discharge for failure to comply with a union security clause, a matter that is specifically regulated by the NLRA, and hence court regulation of the subject would interfere with the jurisdiction of the National Labor Relations Board. Therefore, as we read *Lockridge*, it does not control this case.

II. RESPONDENTS' STATE LAW CLAIMS ARE PREEMPTED BY SECTION 301 BECAUSE THEY ARE SUBSTANTIALLY DEPENDENT ON THE INTERPRETATION OF THE CBA AND THE UNION CONSTITUTION.

This Court held in *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985), that tort claims under state law that substantially depend on an interpretation of a CBA are preempted by section 301. On the other hand, if the claim is not substantially dependent on interpretation of the CBA, the Court has held that the state law claim is not preempted. For example, the state law claim might be merely parallel to a claim that could be based on a CBA, *Lingle v. Norge*, 108 S. Ct. 1877, 1883 (1988), or CBA-related questions might be merely tangential to the central issues of the case, *id.* at 1885 n.12, or there could be substantial issues of state law that are independent of the CBA, as well as important issues that arise under the CBA. *Id.* As in any case in which section 301 preemption is raised as a defense, the questions here are what theories of recovery are permitted under state law, and can those theories prevail without reliance on the CBA?

Respondents' theory of tort liability under state law is based on Sections 323 and 324A of the Restatement (Second) of Torts, which impose liability for the negligence of one who "undertakes, gratuitously or for consideration, to render services to another." The crucial requirement for the purposes of this case is that there must have been an "undertaking," and the question thus becomes, what was petitioner's undertaking? It seems perfectly clear from a reading of the decisions of the Idaho Supreme Court, at least until the reconsideration that this Court ordered after

IBEW v. Hechler, that the Idaho courts would recognize only two undertakings: the CBA and the USWA constitution.

Obviously, the CBA is a contract whose enforcement is exclusively the domain of federal law under section 301, *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962). This Court has also held that, at least when suit is brought by one union entity against another to enforce the union constitution, the constitution is properly treated as a "contract[] . . . between any . . . labor organizations" whose enforcement is similarly governed by section 301. *Plumbers v. Plumbers Local 334*, 452 U.S. 615 (1981). Although the Court did not decide whether a union constitution is still a section 301 contract when it is an individual member who sues the union, *id.* at 627 n.16, the courts of appeals have been unanimous since *Plumbers* that there is no reason why a constitution would be a section 301 contract when a union is a plaintiff but not when an individual is a plaintiff. *Lewis v. Teamsters Local 771*, 826 F.2d 1310, 1312-1314 (3d Cir. 1987); *Kinney v. IBEW*, 669 F.2d 1222, 1229 (9th Cir. 1981). Indeed, because controversies about the meaning of union constitutions will often affect the manner in which unions conduct their bargaining functions, there is no reason not to follow the plain meaning of the language of section 301 by holding that constitutions are contracts and therefore that federal law rather than state law governs the resolution of controversies arising under them.

On remand for reconsideration in light of *IBEW v. Hechler*, and in order to avoid preemption, the Idaho Supreme Court asserted that the state law claims were independent of the CBA. But that conclusion is not enough to preserve the claims against preemption. To the contrary,

as the Court said in *Allis-Chalmers*, "[w]hile the nature of the state tort is a matter of state law, the question whether the [state] tort is sufficiently independent of federal contract interpretation to avoid preemption is, of course, a question of federal law." 471 U.S. 213-214. In order to make a judgment on that federal law question, the Court should do as it did in *Allis-Chalmers*: it should examine the opinions of the state courts to determine the precise theories on which a tort plaintiff is permitted to proceed, and then decide whether those theories ultimately rely on the meaning of the CBA.

In *Allis-Chalmers*, the state tort of bad faith denial or delay in paying insurance benefits was deemed substantially dependent on the CBA because a court could not decide whether the tort was committed without first deciding whether the contract required the benefits, whether it required their award within a certain time period, and whether certain remedies were appropriate for denial or delay in payment. 471 U.S. at 214-220. In effect, the state tort in that case was piggy-backing on a claim of contractual violation. The tort in this case is similarly piggy-backed on a claimed contractual right, because a court cannot decide whether the duty to inspect was negligently performed without first deciding what duty petitioner had "undertaken" and what the scope of that duty was, for which the only sources were the CBA and the union constitution.

Although the Idaho Supreme Court *said* in its post-*Hechler* analysis of federal preemption that the state tort could be applied without construing the contract, Pet. App. 6a, it did not explain how that could happen (except by reference to a supposed "concession" by the union, *see infra* at page 20-21). Even more important, in the course

of addressing the *federal* question, the Idaho Court pointedly refused to reopen the *state* question concerning the nature of the state tort. Pet. App. 8a-9a. Thus, the Court must look to the Court's pre-*Hechler* opinions to ascertain the "undertakings" on which the state tort is founded. And, as we have discussed above, those undertakings are clearly contracts whose enforcement is governed by principles of federal law.

We have also examined respondents' Opposition to the Petition for Certiorari in order to try to determine whether they relied on any "undertakings" other than the CBA and the constitution. Although the Opposition repeatedly asserts that respondents' claims are independent of the CBA, it never identifies the independent "undertaking" on which respondents rely, apart from the CBA and the constitution.

We anticipate that, in their brief on the merits, respondents will argue that the "undertaking" arose from the fact that the union performed inspections, a fact that can be ascertained independent of any construction of the CBA. However, even if respondents assert that the act of inspecting the mines alone is enough to incur duties that are enforceable in tort by anyone injured by the failure to point out safety problems, the assertion of the existence of duties must in fact be valid under state law, and there is no evidence that such is the case.

The major flaw in a theory that mere performance of the inspections was enough to make petitioner liable for the safety committee's mistakes is that there is nothing in the decisions of the Idaho Supreme Court that indicates that this theory is viable under state law. The Idaho courts have by now had ample opportunity to explicate the law as it applies to this case, and if at this late date those courts

have not embraced a theory of "liability by mere conduct," it would be inappropriate for this Court to save respondents' claims from preemption on that theory.[3]

The best respondents can do is to point, out of context, to the passage in the Idaho Supreme Court's opinion that "Because the union, **pursuant to the provisions of the [CBA]**, had contracted to inspect and *in fact inspected* the mine, it owed the (minimal) duty to its members to exercise due care . . .." Pet. App. 29a (only italicized matter emphasized in original). But in quoting this passage, Opposition at 7, respondents omit the material set forth in bold letters, which makes clear that the state court imposed liability because the inspection was conducted pursuant to an undertaking in the CBA.

The unlikelihood that the Idaho Supreme Court would adopt such a position is underscored by the potential reach

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[3] On the other hand, when preemption claims are litigated in federal court, such as because the case was removed on a theory of complete preemption, *see Caterpillar v. Williams*, 483 U.S. 386 (1987), there is a danger that the federal court will improperly construe state law in such a way that it depends on the CBA, and then use that erroneous construction as a basis for finding preemption, without ever giving the employee plaintiff an opportunity to ask the state courts for a ruling on a novel state law claim. Given the general presumption against preemption of state law, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981), the burden is rightly placed on the proponent of a section 301 preemption defense to demonstrate that a novel theory of state law, which the plaintiff contends would avoid the need to construe a CBA, would in fact not be accepted in the state courts. Here, however, respondents have had every opportunity to obtain a ruling on whatever state law claims they wished to advance, and if they cannot point to any Idaho court acceptance of the theory of liability for mere performance, they should not be able to avoid preemption by appealing to the possibility that such a theory might be deemed acceptable if the state courts were to focus upon it.

of a ruling that anyone who looks at the safety devices in a mine necessarily incurs responsibility for injuries that occur thereafter. For example, suppose that a cousin of the mine-owner had accompanied a management safety inspection because she was taking a class at the local university on mine safety and wanted to see what a mine looks like. Surely, respondents would not contend that the state courts would impose personal liability on the cousin for the ninety-one deaths that followed, unless the cousin also "undertook" to do the inspection as a service to management or to the union membership. Yet in order to determine here whether the union "undertook to render services to another", which is what the Restatement requires, and in order to determine the scope of the "service" undertaken, the state courts would have to look to the CBA and the constitution, and not just to the fact of inspection.

Indeed, there is another fact in the record — undisputed so far as we are aware — that respondents do not discuss, and which further undercuts their theory. In this case, the appointments to the safety committee were made, not by petitioner USWA, but by Steelworkers Local 5089, which is not a defendant in this case, presumably because it does not have a deep pocket. Pet. App. 94a-95a. In order to demonstrate that the mere action of the safety committee was an "undertaking" by petitioner, respondents would no doubt have to rely on the CBA (to which petitioner was a party) and the USWA constitution to show that the USWA undertook to be responsible for the errors of safety committees controlled by officers of its autonomous locals. Thus, it seems clear that the state tort entirely depends on

a construction of the CBA and the constitution, and so is preempted by section 301.[4]

The final fingerhold to which respondents may try to cling is the assertion, made in the Idaho Court's post-*Hechler* opinion, that there is no issue of contract interpretation under section 301 because "the parties" conceded that the union "did actively undertake" safety inspection duties. Pet. App. 6a, *see also id.* 5a. Although this assertion relies on a kernel of correct legal analysis, its application to this case has no basis either in fact or in law.

The notion that the union's "concession" avoids preemption is based on the indubitable proposition that, for there to be complete preemption under section 301, there must be a genuine dispute about the interpretation or application of the CBA to which federal law must be applied. *See Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 13 (1983); *cf. Hunter v. United Van Lines*, 746 F.2d 635, 648 n.8 (9th Cir. 1984). But it is hard to see how that rule can be applied to avoid preemption here, because, so far as we are aware, petitioner has never conceded that, properly construed, the CBA (or its

[4] We understand that respondents sought to rely on certain detailed manuals supplied by the petitioner to instruct local safety committees on how to improve workplace safety. To the extent that these manuals constitute a form of regulation of the locals adopted under the constitution, or even are a set of independent agreements with the locals, their existence does not change the fact that the ultimate question of international responsibility for the local union's negligence depends in large part on an interpretation of the constitution, a question on which federal law governs. The manuals may also bear on the question of whether the inspections were properly done, but of course that does not help respondents avoid the need to rely on section 301 contracts in order to sustain their state law theories.

constitution) contained any undertaking to provide inspection services, not to speak of an undertaking of this kind and magnitude. Nor, indeed, did the post-*Hechler* opinion identify the place in the record where the union made such a concession, and the Idaho Court's pre-*Hechler* opinions pointed only to the CBA and constitution (whose existence was conceded, but whose meanings and significance were hotly contested) as evidence of the union's undertaking. Thus, respondents cannot rely on the contention that the application of the CBA and the constitution to this dispute is uncontested as a basis for avoiding preemption of their tort claims by section 301.

III. THE JUDGMENT BELOW SHOULD BE REVERSED.

The conclusion that respondents' tort claims are preempted by section 301 does not require their dismissal. Rather, the preemptive force of section 301 merely converts the tort claims into section 301 claims based on the union's alleged undertaking to perform safety inspections, and requires that those claims be resolved according to federal law principles. Because the courts below never focused on the manner in which such federal law principles should be applied to this case, the Court may conclude that it would be appropriate to remand the case to the lower courts to permit them to address those issues in the first instance. On the other hand, the age of this case, the apparent hostility of the Idaho Supreme Court to the application of federal principles, and the possibility that there may be some dispositive procedural issues may lead the Court to exercise its discretion to decide the federal questions now. In the event that the Court opts for the latter course, we

explain how we think this case should be resolved under the principles of section 301.

A. First, there is the question of whether the section 301 action was timely filed. In *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), the Court held that the proper limitations period for suing to enforce a CBA under section 301 should be borrowed from the state statute of limitations for suing to enforce an oral contract. On that theory, this case, which was filed less than a year after the mine disaster, should not be dismissed as untimely. The much shorter limitations periods adopted in *UPS v. Mitchell*, 451 U.S. 56 (1981), and *DelCostello v. Teamsters*, 462 U.S. 151 (1983), should not be applied for two reasons. First, this case does not involve a challenge to an arbitration decision, as *Mitchell* did, and the case does not threaten, as *DelCostello* did, an accommodation between employer and union reached in the course of collective bargaining or contract administration. Thus, as this Court indicated in *Reed v. UTU*, 109 S. Ct. 621 (1989), only claims that are closely analogous to hybrid actions against the union and the employer, and that do threaten a labor-management compromise in the same fashion as hybrid claims do, should be subjected to the six-month limitations period adopted in *DelCostello*. Moreover, this case was brought so long before *Mitchell* and *DelCostello* were decided, and so long before the approaches adopted in those cases were accepted by any court, that the retroactivity principles of *Chevron Oil Co. v. Huson*, 404 U.S. 91 (1971), would make retroactive application of a short limitations period highly inappropriate.

Nor would it be appropriate to dismiss for failure to exhaust contractual remedies or, in the alternative, for failure to show that the union's breach of its DFR

prevented respondents from exhausting. That course would plainly be appropriate if respondents were suing to enforce the CBA against the employer, and could have asked the union to file a grievance in their behalf by invoking the procedures provided by the CBA. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); *Vaca v. Sipes*, 386 U.S. 171 (1967). Here, however, respondents claim that the union violated its own section 301 "undertaking." Not only is there no indication that the CBA's grievance procedure applies to claims based on alleged union violations of the CBA or of its constitution, but it is unreasonable to suggest that respondents should have relied on either of the parties to the CBA — the union or the employer — to represent them in any such grievance procedure. And although petitioner has argued that the DFR ought to preempt respondents' *state* law claims, we see no basis for a similar conclusion that, once those claims are transformed by section 301 preemption into a federal law claim, the DFR ought to have any effect on that federal claim.

Put another way, to the extent that a union makes a promise, whether to its members or to the employees whom it represents, we see no reason why federal labor law should strip those workers of the benefit of that promise and replace it with a more limited protection afforded by the judge-made standards of the DFR. *Cf. Belknap v. Hale*, 463 U.S. 491 (1983). But we do agree that those promises should be under section 301, and it is to the question of how to apply that section in this case that we now turn.[5]

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[5] Arguably there might be a requirement of exhaustion of intra-union remedies, depending on whether any of the exceptions to that

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B. This Court, or another court, will have to reach the merits of respondents' section 301 claim that the CBA and the constitution contained promises by the union to conduct safety inspections and thereby to protect the employees in the bargaining unit against safety hazards. The ensuing analysis of the CBA should be conducted in light of "the realities of industrial life." *DelCostello v. Teamsters*, 462 U.S. 151, 172 (1983). Here, the feature of labor relations that seems most significant here is that CBAs most commonly consist of promises exacted by the union from management, limiting the discretion that management would otherwise have in controlling the operations of the workplace, in return for a very limited set of promises made by the union to management, *i.e.*, the commitment not to engage in strikes and other interruptions of work during the term of the agreement. *Boys Markets v. Retail Clerks Local 770*, 398 U.S. 235 (1970). *See generally* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663 (1973). We would not rule out the possibility that some CBAs may contain promises from a union to its membership, although most commonly those promises will be found elsewhere (such as in the union constitution). But in light of the nature of labor relations and of the contents of most CBAs, the courts should not lightly presume that vague language in a CBA was intended to constitute a promise from a union to its members. Rather, the courts should insist that, before a CBA should be construed to create obligations on the part

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doctrine applied. *Clayton v. UAW*, 451 U.S. 659 (1981). However, because that defense only requires a court to stay its hand pending completion of the exhaustion, *id.* at 695; *NLRB v. Marine Workers*, 391 U.S. 418, 426 (1968), it seems highly unlikely that applying the doctrine here would help resolve the dispute between these parties.

of the union to the membership, there should be clear language to that effect in the contract, or at least some terms of art commonly recognized as creating such obligations. A requirement of express language is especially appropriate where, as here, the alleged obligation would impose a new set of duties on the union, with the possibility of enormous liabilities resulting from any failure to meet them.

C. Turning to the CBA in this case, respondents and the Idaho courts have relied exclusively on Article 9, but that language contains nothing that directly guarantees employees that their union will protect them against safety hazards. Section 1 states simply that the employer and the union "will continue to cooperate toward the objective of eliminating . . . hazards." Pet. App. 169a. If this sentence contains anything more than platitudes, it is an exchange of promises between the union and the employer; it does not purport to promise anything to the employees.

Section 2 requires the union to approve "reliable" employees to participate in an inspection with an equal number of supervisors if, following a complaint by an individual employee, the employee believes that there are problems that have not been corrected. Pet. App. 169a. These inspectors together have the power to decide what should be done, if anything, to correct the hazard of which the employee complained. This section does not require the employer to accept union suggestions, and inasmuch as the inspectors must decide jointly on any action to be taken, that cannot occur unless management's representatives concur with the views of the union's representatives. And, if there is disagreement between the two sides, the union can do no more than file a grievance. Furthermore, this section applies only where an

employee makes a complaint and is dissatisfied with management's response, but the record does not suggest that any of the decedents in this case (or anyone else) made the complaints required by Section 2, which would qualify them or their heirs to assert whatever rights this section gave them.

Similarly, sections 4 and 5 give the union only the right to have union representatives "accompany" state inspectors or company safety engineers, respectively, on tours of the mine. Pet. App. 171a. These sections do not expressly require the union to do anything either during or after the inspection, except to "consider" the "results" of the tours at meetings with management. If, as we suggest, an explicit statement of union obligation is required to impose liability on the union for alleged failure to comply with a promise in a CBA, these sections simply are not sufficiently definite to warrant a finding of union liability.[6]

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[6] If the court were to reject the general rule that we suggest, under which a union may be found to have made promises to the employees in a CBA only if there is express language to that effect, the Court might consider whether the employer's immunity from liability for its own negligence should, as a matter of federal law, shield the union from derivative liability for failure to encourage the employer to correct its own negligence. After all, it is the employer's negligence that causes mining accidents, and the union's "contribution" to the problem is simply its negligent failure to point out the employer's negligence or to compel the employer to correct its mistakes. Here, the employer has been released from the liability which it would ordinarily have by a state policy that requires minimal payments through the worker compensation system in return for immunity from tort litigation. In those circumstances, federal labor policy might require states that provide such immunity to the employer to extend a similar protection to unions that would only be secondarily liable based on their promises to protect their constituents from the effects of the employer's negligence.

D. Last of all, respondents argue that they were guaranteed reasonable union inspections by the union constitution. It is highly unlikely that the vague constitutional provisions on which respondents rely, recognizing a general objective of "improving the conditions of employment" and requiring establishment of safety committees in each Local Union, *see* Pet. App. 24a, created a constitutional right, enforceable by a suit for damages, to have the union do a non-negligent job in achieving a safe workplace. But because union constitutions normally consist of promises by the union to the membership (and to its constituent locals), it would be inappropriate to apply the general rule requiring explicit language that we have suggested for reading CBAs.

It *would* be appropriate to follow another general rule, one that requires a court to defer to a reasonable, long-standing interpretation of the union constitution placed upon it by the governing body of the union, that is authorized by the constitution to render binding interpretations.[7] So far as we are aware, no such interpretation has been placed on the record. On the other hand, the constitutional provision itself does not seem to constitute any sort of undertaking by petitioner to guarantee either a safe workplace or safety enforcement efforts of a given quality. If anything, the constitution requires its *locals* to establish committees and, perhaps, encourages them to undertake commitments to their members. Given the age of this case, it seems unnecessary to remand the case unless respondents can

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[7] The court should not permit such deference where the interpretation is rendered in the course of formulating a litigating position.

point to something in the record that supports their claim that petitioner made the undertaking on which their claim depends. If a remand is allowed, the Court should permit only the question of the meaning of the constitutional provision and any union regulations or procedures adopted under it to be decided by the courts below following appropriate proceedings pursuant to the principles of federal labor law that are applicable to actions such as this one under section 301.

CONCLUSION

The judgment should be reversed, and the case remanded to the Supreme Court of Idaho for further proceedings consistent with the foregoing analysis.

Respectfully submitted,

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No. 89-322

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

vs.

THARON RAWSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR SETH RAWSON AND CINDY RAWSON; BERNIECE JOHNSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON AND JOHN RUSSEL JOHNSON; LAURA DUNBAR, AS GUARDIAN AD LITEM FOR RICKINA ROSSITER AND GLEN ROSSITER, JR.; AND MARY WOOD, AS GUARDIAN AD LITEM FOR LESLIE D. WOOD,
Respondents.

On Writ of Certiorari To The
Supreme Court of Idaho

BRIEF OF CONTINENTAL BEVERAGE PACKAGING, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

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Respondents.

On Writ of Certiorari To The
Supreme Court of Idaho

BRIEF OF CONTINENTAL BEVERAGE PACKAGING, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

Continental Beverage Packaging, Inc. ("Continental"), with the consent of all parties, files this brief as amicus curiae in support of Petitioner United Steelworkers of America ("Steelworkers"). Continental urges the Court to reverse the judgment of the Supreme Court of the State of Idaho on the specific ground that the Respondents' claims are preempted by § 301 of the Labor Management Relations

Act because the duties which Respondents claim are owed to them by Steelworkers are created by the collective bargaining agreement between Steelworkers and Respondents' decedents' employer.[1]

INTEREST OF AMICUS CURIAE

Continental is party to *United States Can Co. v. International Association of Machinists & Aerospace Workers*, No. 89-508 (October Term 1989). On January 8, 1990, this Court denied Continental's petition for certiorari to review a decision of the Wisconsin Supreme Court holding that a state claim, arising under Wisconsin's version of the Uniform Fraudulent Conveyance Act, to enforce the economic terms of a collective bargaining agreement was not preempted by § 301 of the Labor Management Relations Act. As of the date of submitting this brief amicus, Continental has a petition for rehearing from the denial of that petition pending before this Court. Continental believes that the reversal of the decision of the Idaho Supreme Court on the specific ground urged in this brief would compel reversal or remand of the decision of the Wisconsin Supreme Court in Case No. 89-508.

SUMMARY OF ARGUMENT

Amicus submits that the analysis of which claims asserted by parties to collective bargaining agreements against other parties to such agreements are preempted, would be simplified and sharpened by requiring courts to focus their attention on the issue of *whether* the *substantive right* being asserted *was created by* the provisions of *a collective bargaining agreement*. This analysis, which is sufficient to reach a correct result in nearly all § 301 preemption cases, including the instant case, is essential to comprehensive preemption of collective bargaining issues and is easier to apply than an analysis of whether "substantial analysis" or "substantial interpretation" is required.

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[1]Amicus does not mean to suggest that other grounds for reversal are not presented, but Amicus has no interest in those.

ARGUMENT

CLAIMS WHICH ARE FOUNDED ON RIGHTS CREATED BY THE SUBSTANTIVE PROVISIONS OF A COLLECTIVE BARGAINING AGREEMENT ARE PREEMPTED BY § 301.

By its express terms, § 301 of the Labor Management Relations Act provides a jurisdictional basis for federal courts to hear "[s]uits for violation of contracts between an employer and a labor organization representing employees." 29 U.S.C. § 185(a). This Court has consistently construed § 301 to do "more than simply confer jurisdiction on federal courts to hear suits charging violations of collective-bargaining agreements. . . . '[It is] a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts.' " *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851, 855-56 (1987) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985)); *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 450-51 (1957). In order to fulfill this mandate, ' "substantive principles of federal labor law must be paramount in the area covered by [§ 301].' " *Hechler*, 481 U.S. at 856 (quoting *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962)).

With these principles well settled, this Court commenced in *Lueck* to define the boundaries of the "area covered by § 301." In *Lueck*, this Court held that an attempt to assert a claim arising under state law was preempted by § 301 if it was grounded in a collective bargaining agreement:

> If the policies that animate § 301 are to be given their proper range, however, the pre-emptive effect of § 301 must extend beyond suits alleging contract violations. *These policies require that "the relationships created by [a collective-bargaining] agreement" be defined by application of "an evolving federal common law grounded in national labor policy."* . . . Thus, questions relating to what the parties to a labor agreement agreed, *and what legal consequences were intended to flow from breaches of that agreement*, must be resolved by reference to

uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract.

471 U.S. at 210-11 (citation omitted) (emphasis added).

In *Hechler*, this Court applied the principles stated in *Lueck* to hold that an attempt to assert a claim for negligent performance of a duty created by a collective bargaining agreement was preempted by § 301:

> Under the principle[s] set forth in *Allis-Chalmers*, we must determine if respondent's claim is sufficiently independent of the collective-bargaining agreement to withstand the pre-emptive force of § 301.
>
> . . . .
>
> . . . [Respondents' claim is not sufficiently independent because] [i]n order to determine the Union's tort liability . . . a court would have to ascertain, first, whether the collective-bargaining agreement in fact placed an implied duty of care on the Union to ensure that Hechler was provided a safe workplace, and, second, the nature and scope of that duty . . . .

481 U.S. at 859, 862.

The holdings of *Lueck* and *Hechler* were summarized in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987):

> Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims "substantially dependent on analysis of a collective-bargaining agreement."

Id. at 394 (quoting *Hechler*, 481 U.S. at 859 n.3).

The foregoing passage from *Williams* was quoted with approval in *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877, 1883-84 n.10 (1988), the most recent § 301 preemption case. In *Lingle*, this Court held that a state claim for retaliatory discharge for asserting a workers compensation claim was not preempted. Because it was perfectly apparent that the tort of retaliatory discharge was not, in any sense of the word, "founded directly on rights created by [the] collective bargaining agreement," this Court addressed only the issue of whether the claim required interpretation of the collective bargaining agreement and concluded it did not:

> Thus, the state-law remedy in this case is "independent" of the collective-bargaining agreement in the sense of "independent" that matters for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement.

Id at 1882.

There is certainly no affirmative suggestion in *Lingle* that claims based on "rights created by" a collective bargaining agreement were no longer preempted, and the citation of *Williams* confirms that there was no intent to remove such claims from the scope of § 301 preemption. However, analysis of § 301 preemption has suffered subsequent to *Lingle* because the lower courts have relied on the phrase "application of state law is pre-empted by § 301 . . . *only* if such application requires the interpretation of a collective-bargaining agreement," *Lingle*, 108 S. Ct. at 1885, to skip over or give short shrift to the issue of whether the rights sued upon were "created by" the collective bargaining agreement in issue. Treating the cases presented to this Court on § 301 preemption or Railway Labor Act § 3 preemption since *Lingle* as typical of all lower court decisions, out of twenty such cases,[2] only one, *Terwilliger v. Greyhound Lines, Inc.*, 882 F.2d

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[2]*See Terwilliger v. Greyhound Lines, Inc.*, 882 F.2d 1033 (6th Cir.), *petition for cert. filed*, 58 U.S.L.W. 3430 (U.S. Dec. 22, 1989) (No. 89-999); *Wells v. General Motors Corp.*, 881 F.2d 166 (5th Cir.), *petition for cert. filed*, 58 U.S.L.W. 3469 (U.S. Dec. 27, 1989) (No. 89-1067); *Berda v. CBS Inc.*, 881 F.2d 20 (3d Cir. 1989), *cert. denied*, 58 U.S.L.W. 3466 (U.S. Jan. 22, 1990) (No. 89-589); *Cleary v. Michigan Bell Tel. Co.*, 880 F.2d 1321 (6th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3465 (U.S. Jan. 22, 1990) (No. 89-844); *Smolarek v. Chrysler Corp.*, 879 F.2d 1326 (6th Cir.) (en banc), *cert. denied*, 110 S. Ct. 539 (1989); *Wilkinson v. Safeway Stores, Inc.*, 879 F.2d 866 (9th Cir.), *cert. denied*, 110 S. Ct. 540 (1989); *Deford v. Soo Line R.R.*, 867 F.2d 1080 (8th Cir.), *cert. denied*, 109 S. Ct. 3265

1033 (6th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3430 (U.S. Dec. 22, 1989) (No. 89-999), clearly analyzes the "created by" and the "interpretation" bases of § 301 preemption as separate tests:[3]

> Thus, in evaluating Terwilliger's claim, we must determine first, whether resolution of Terwilliger's state-law claim of fraud and misrepresentation requires interpretation of the terms of the collective bargaining agreement such that this claim should have been decided by arbitration . . . and second, whether his claim is based on rights created by the collective bargaining agreement or under state law.

Id. at 1037.

Terwilliger concluded that both tests were met because the employer was found to have failed to abide by the terms of the agree-

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(Continuation of Footnote 2)
(1989); *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 3158 (1989); *Miller v. Publishers Paper Co.*, 861 F.2d 268 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 3160 (1989); *Utility Workers, Local No. 246 v. Southern Cal. Edison Co.*, 852 F.2d 1083 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1530 (1989); *Hammond v. Terminal R.R. Ass'n*, 848 F.2d 95 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1170 (1989); *McCall v. Chesapeake & Ohio Ry.*, 844 F.2d 294 (6th Cir.), *cert. denied*, 109 S. Ct. 196 (1988); *Jones v. Truck Drivers Local Union No. 299*, 838 F.2d 856 (6th Cir. 1988), *cert. denied*, 110 S. Ct. 404 (1989); *Birtell v. Lockheed-California Co.*, 201 Cal. App. 3d 293, 247 Cal. Rptr. 86 (1988), *cert. denied*, 109 S. Ct. 869 (1989); *Alpha Beta, Inc. v. Superior Court (Nahm)*, 198 Cal. App. 3d 1390, 244 Cal. Rptr. 414, *cert. denied*, 109 S. Ct. 392 (1988); *Rawson v. United Steelworkers*, 115 Idaho 785, 770 P.2d 794 (1988), *cert. granted*, 110 S. Ct. 714 (1990); *Aubuschon v. International Mill Serv.*, 123 Ill. 2d 555, 530 N.E. 2d 976 (1988), *cert. denied*, 109 S. Ct. 3157 (1989); *LePore v. National Tool & Mfg. Co.*, 115 N.J. 226, 557 A.2d 1371, *cert. denied*, 110 S. Ct. 366 (1989); *Pet, Inc. v. Buckner*, No. 65,989 (Okla. Ct. App. Oct. 20, 1987), *cert. denied*, 109 S. Ct. 60 (1988); *International Ass'n of Machinists & Aerospace Workers v. United States Can Co.*, 150 Wis. 2d 479, 441 N.W.2d 710 (1989), *cert. denied*, 110 S. Ct. 718 (1990).

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[3] *Terwilliger* claims that *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1331 (6th Cir.) (en banc), *cert. denied*, 110 S. Ct. 539 (1989), applied the same analysis. While that claim may be true, *Smolarek's* analysis is certainly not as crisply divided into two parts as is *Terwilliger's*.

ment — which would require interpretation — and the claimed right to reinstatement arose solely from the collective bargaining agreement — *i.e.*, was "created by" the collective bargaining agreement.

In order to prevent the lower courts from mistakenly assuming that the "rights created by" test for preemption has been abandoned by this Court, it is essential that this Court clearly rearticulate and apply that test in the instant case.

There can be no question that the collective bargaining agreement in the instant case imposed a duty of inspection on the Steelworkers. The majority and dissenting opinions below, prior to remand, agreed that the collective bargaining agreement did impose safety obligations on the Steelworkers:

> The Collective Bargaining Agreement provided for the Union's safety inspection function, which service was bought and paid for by union dues.
>
> . . . .
>
> . . . Because the Union, pursuant to the provisions of the collective bargaining agreement, had contracted to inspect and, *in fact, inspected* the mine, it owed the (minimal) duty to its members to exercise due care in inspecting and in reporting the findings of its inspection.

Rawson v. United Steelworkers, 726 P.2d 742, 747, 750 (Idaho 1986), *vacated and remanded*, 482 U.S. 901 (1987).

> [T]he collective bargaining agreement [in question] provided for the formation and membership of the Safety Committee and set forth the duties of the Safety Committee.

Id. at 763 (Bakes, J., dissenting).

Given the one-time agreement of the entire Idaho Supreme Court that the Respondents' claims are based on rights created by the collective bargaining agreement, there can be no doubt that these claims are preempted under the "created by" test. Indeed, *Hechler* expressly held, on nearly identical facts, that when "the collective-bargaining agreement in fact placed an implied duty of care on the Union to ensure that Hechler was provided a safe workplace," a claim for

breach of that duty is preempted. 481 U.S. at 862.[4]

It is important that this Court expressly state that Respondents' claims are preempted on the ground that the Respondents' claims are based on rights created by the collective bargaining agreement.

First, it is, after all, "suits for violations" of collective bargaining agreements which are expressly, although not exclusively, preempted by § 301. Therefore, it is most logical to inquire *first* whether a violation is claimed, *i.e.*, if the claim asserts breach of a right or duty created by the agreement. That inquiry is sufficient to decide preemption here. It is sufficient to explain the result in *Lueck* and all this Court's subsequent decisions. It should be sufficient to decide most § 301 cases.

Second, as this Court stated in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962), § 301 preemption must be "comprehensive." "Comprehensive" preemption requires that every right which is created by provisions of a collective bargaining agreement be determined according to federal law. Otherwise the provision of its agreement may have different legal effects in different jurisdictions. This is not just a question of interpretation; federal labor policy requires that the *effect* of the provisions of a collective bargaining agreement be uniform. *See Lueck*, 471 U.S. at 210-11. Uniformity can be lost as quickly through applying varying state remedies to crystal clear contractual language as it can through various interpretations of ambiguous language. Therefore, § 301 must preempt *all* claims which are *based on rights* contained in a collective bargaining agreement or "comprehensive" preemption will be lost.

Finally, the "rights created by" analysis offers a much simpler analysis than "interpretation."[5] It is comparatively easy to deter-

[4]It is equally true that *Hechler* leaves no doubt that questions of contract interpretation underlie any finding of tort liability on the facts of this case, *see* 481 U.S. at 862, but the goal of Amicus is to encourage the Court not to rely on that ground alone.

[5]This is not to say that interpretation is not a proper ground for preemption, only that it should not be necessary to reach that ground in most cases.

mine whether a necessary element of a claim includes reliance on the terms of a contract. It is clearly in the interests of efficient administration of justice that a simple test be applied if at all possible.

CONCLUSION

For the reasons stated above, Amicus respectfully suggests that the decision of the Idaho Supreme Court be reversed and the cause be remanded with instructions to dismiss the case, on the ground that the Respondents' claims are based on rights created by a collective bargaining agreement.

Respectfully submitted,

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